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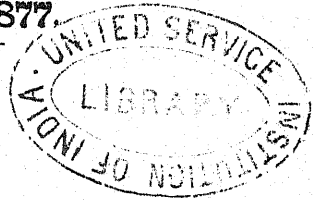
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THE LAW RELATING TO MINORS.





Tagore Law Lectures—1877.



THE

LAW RELATING TO MINORS

IN THE

PRESIDENCY OF BENGAL.)

BY

ERNEST JOHN TREVELYAN,

BARRISTER-AT-LAW.

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## CORRIGENDA.

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Page 30, line 27, for "1854," read "1865."

„ 31, line 4, for "of," read "at."

„ 36, line 17, for "recognized," read "recognizes."

„ 42, margin, for "stpmother," read "stepmother."

„ 45, line 10, and at end of page 238, add "*In the matter of Pannamoney Dessee*, decided by Garth, C.J., and Markby, J., on the 4th of June 1878, it was held that, under Hindu law, the relations of an infant, other than his father and mother, have not, without being appointed guardians by a Civil Court, any absolute right to the custody of his person."

Page 118, note 1, *dele* "Act IV (B.C.) of 1870."

„ 124, line 23, for "orwhe ther," read "or whether."

„ 154, note 2, for "XII," read "XI."

„ 323, note 5, for "X," read "IX."

„ 334, line 21, for "o fneed," read "of need."

„ 343, line 17, for "trusts," read "trustent."

„ 358, note 2, for "English," read "English."

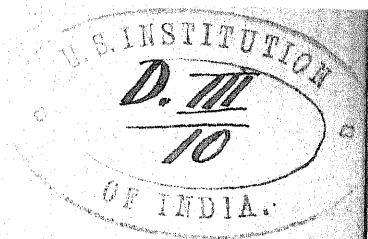
„ 389, note 4, for "IX," read "XIX."

„ 418, note 3, for "1857," read "1877."

„ 421, note 3, for "464," read "444."







## LECTURE I.

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### THE AGE OF MAJORITY.

THE subject of the course of lectures which I propose to deliver is the law relating to the disability of infancy in the Bengal division of the Presidency of Fort William.

An infant, in the legal sense of the term, is a person who has not attained the age of majority according to the personal law to which he is subject.

This age is arbitrarily fixed by the law of each country, and is chosen with reference to the time of life when persons ordinarily have attained years of discretion and are capable of the management of their own affairs.

In consequence of their want of experience, and of the immaturity of their judgment, the laws of all countries provide for the care and protection of the persons and property of infants ; and infants are declared incapable of entering into many of the transactions of life.

During the course of my lectures I shall have to consider the incapacity of infants according to the law current in Bengal, and the provisions made by that law for the protection of their persons and

property. The present lecture will be devoted to a consideration of the age of majority in Bengal.

The age of  
majority in  
Bengal.

Until the passing of the Indian Majority Act<sup>1</sup> there was no uniform age of majority in Bengal. The age of majority of Hindus and Mahomedans was determined by the provisions of their respective laws, modified under certain circumstances by English legislation; while the limit of the minority of European British subjects, and other inhabitants of Bengal, was derivable from other sources of law.

Hindu law.

Menu.

The Hindu law does not seem to have originally fixed any specific age of majority. Menu says<sup>2</sup>—“Let a Brahmin, having dwelt with a preceptor during the first quarter of a man’s life, pass the second quarter of human life in his own house, when he has contracted a legal marriage.” Then we have the following sloka from the Narada Smriti:<sup>3</sup> “From the moment God gives life, till

Narada  
Smriti.

<sup>1</sup> IX of 1875: came into force 2nd June, 1875.

<sup>2</sup> According to the Gloss of Colluca, translated by Sir W. Jones, chap. iv, sloka 1.

<sup>3</sup> See the Maharajah of Vizianagram’s speech in the discussion in the Legislative Council on the Indian Majority Bill.—*Supplement to the Gazette of India, of April 25th, 1874*, at p. 671.

In Colebrooke’s Digest, Bk. ii, chap. ii, verse 15, edn. 1801, Vol. II, p. 115, the sloka is thus translated:

“An infant (sisu) before his eighth year must be considered as similar to a child in the womb; but a youth or adolescent (pāṇḍa) is called a minor until he has entered his sixteenth year: afterwards he is considered as acquainted with affairs, or adult in law, and becomes independent on the death of both parents; but, however old, he is not deemed independent while they live.” See also Bk I, chap. v, verse 188, at Vol. I, p. 293.

eight years of age, a child may be considered as if in the womb; from his eighth year, till his sixteenth year, he may be called a boy; and then a youth; after that period he can begin to see for himself independent of his parents." The interpretation put upon this last sloka by the pundits was, that the sixteenth year is the limit of minority for Hindus; and this seems to be supported by several parallel texts, though opinions varied as to whether the limit was the first or the last day of the sixteenth year.<sup>1</sup>

The writers of the Bengal school of law accepted the first day of the sixteenth year,—that is to say, the termination of the fifteenth year,<sup>2</sup> as the limit of minority, both for males and females;<sup>3</sup> and this interpretation was followed by the English courts of law in Bengal, and so adopted as the legal age of majority of Hindus subject to the Bengal school of law.<sup>4</sup>

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<sup>1</sup> See remarks in note to *Luchmun Das v. Roopchand*, 5 Sel. Rep. 115.

<sup>2</sup> *Luchmun Das v. Roopchand*, 5 Sel. Rep. 115. See Annotation of Srikrishna to Dayabhaga, chap. iii, sec. 1, verse 17. 1 Macnaghten's Hindu Law, edn. 1829, p. 103.

<sup>3</sup> 2 Macnaghten's Hindu Law, edn. 1828, p. 220.

<sup>4</sup> See *Cally Churn Mullick v. Bhuggobutty Churn Mullick*, 10 B. L. R. 231; S. C. 19 W. R. C. R. 110. See also *Monsoor Ali v. Ramdial*, 3 W. R. C. R. 50; *Deobomoyee Dasse v. Joggessur Hati*, 1 W. R. C. R. 75; *Luckheenarain Mojoomdar v. Muddhosoodun*, S. D. A. 1853, p. 505; and *Sheebunker Dass v. Ulick Chunder Aych*, 15 S. D. A. 886; and also Colebrooke's Digest, Bk. i, chap. v, verse 188.

Benares,  
and Mithi-  
la schools.

Jain law.

Mahome-  
dan law.

The Benares and Mithila schools of law placed the age of majority at the expiration of the sixteenth year,<sup>1</sup> which is also the limit of minority for persons subject to the Jain law.<sup>2</sup>

According to Macnaghten,<sup>3</sup> under the Mahomedan law current in Bengal, all persons, whether male or female, are considered minors, until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.<sup>4</sup>

There is no doubt that puberty is the test of majority according to Mahomedan law;<sup>5</sup> but Macnaghten's statement of the age of majority does not seem to be supported by any other authority. Indeed, in another part of Macnaghten's own work, the expiration of the fifteenth year is stated as the time of the attainment of majority by persons subject to the Mahomedan law;<sup>6</sup> and this latter age seems to have been adopted by the

<sup>1</sup> 2 Strange's Hindu Law, edn. 1830, pp. 76 and 80.

<sup>2</sup> *Maharaja Govindnath Roy v. Gulal Chand*, 5 Sel. Rep. 280.

<sup>3</sup> Principles of Mahomedan Law, 4th edn., p. 62.

<sup>4</sup> Followed in *Mooleram v. Syud Agha Meer*, S. D. A., 1856, p. 572; and *Abdool Oahab Chowdhry v. Mussamut Elias Banoo*, 8 W. R. C. R. 301.

<sup>5</sup> Sev. Rep., S. D. A., Ben., IV, p. 851. Baillie's Law of Sale, 2. In his speech on the Majority Bill, reported at p. 670 of the Supplement to the *Gazette of India* for April 26th, 1874, the Maharajah of Vizianagram quotes the opinion of Munshi Amir Ali, whom he describes as an acknowledged and highly respectable Mahomedan authority, that the age regarding majority prescribed in the Mahomedan law has direct reference to young persons acquiring right for practising offices connected with religion.

<sup>6</sup> Macnaghten's Precedents of Mahomedan Law, Chap. VI, case 17.

English courts of law as the period at which Mahomedans attained the age of majority.

In the Koran it is said,<sup>1</sup> "Examine the orphans The Koran. until they attain the age of marriage (or age of maturity): but (*i.e.*, and then) if you perceive they are able to manage their affairs well, deliver their substance unto them; and waste it not extravagantly, or hastily, because they grow up (*i.e.*, because they will shortly be of age) to receive what belongs to them."

In addition to the *bulugh*, or age of puberty, they must have attained the *rashad*, or true path,—*i.e.*, the knowledge to judge good from bad, to understand religious matters, and to manage their property efficiently, before the property can be delivered over to them.<sup>2</sup>

But Durrat Mookhtar, who was one of the chief Durrat Mookhtar. commentators on the Koran, expressly lays down,<sup>3</sup> that the completion of the fifteenth year is the limit of minority, unless signs of puberty occur at an earlier age; and this authority is supported by the Jami-ur-Ramuz.

Haneefa fixed the age of majority for males at the Haneefa. completion of eighteen years, and for females at the

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<sup>1</sup> Chap. IV, Sale's Translation, edn. 1865, p. 60.

<sup>2</sup> Durrat Mookhtar. See Supplement to *Gazette of India*, April 25th, 1874, p. 670.

<sup>3</sup> Pp. 685 and 686. See Tagore Law Lectures for 1873, by Shama Churn Sircar, p. 473.

Abu Yusuf  
and Mu-  
hammed.

completion of seventeen years, if they do not show signs of puberty at an earlier age. Haneefa's two disciples (Abu Yusuf and Muhammed) fix the age of majority at the end of the fifteenth year for both males and females, and there is one report of Haneefa to the same effect.<sup>1</sup> The opinions of Abu Yusuf and Muhammed on this subject may be taken as equal to, if not surpassing that of, their master.<sup>2</sup>

Hedaya.

The author of the Hedaya<sup>3</sup> may be also taken as supporting the opinion of the two disciples in preference to that of their master.<sup>4</sup>

There, therefore, seems to be great uncertainty as to the limit of minority under the Mahomedan law for males as well as for females;<sup>5</sup> but it is clear that all writers concur in fixing puberty as the test of majority, with this proviso that the earliest age of majority was twelve years in respect of a boy and nine years in respect of a girl.

Result of  
authorities.

The result of the better authorities seems to be that, under the Mahomedan law, at the expiration of the fifteenth year an irresistible presumption of puberty arises; and that every person who has

<sup>1</sup> See Hedaya Bk. xxxv, chap. ii. Hamilton's Translation, edn. 1791, Vol. III, pp. 482 and 483.

<sup>2</sup> See Morley's Digest, Introduction, pp. cclxii and cclxiii.

<sup>3</sup> Sheikh Burhad-uddin Ali.

<sup>4</sup> See Tagore Law Lectures for 1873, note to p. 474.

<sup>5</sup> See *Rajah Enaet Hossein v. Ranee Roshun Jahan*, 5 W. R. C. R. 5; and *Newab Mulka Jehan Sahiba v. Mahomed Ushkurree Khan*, 26 W. R. C. R. 26.

not before that age arrived at puberty must at that age be considered an adult in law.

Thus the Hindu and Mahomedan laws current in Bengal, although they prescribed no specific age for the termination of minority, indirectly pointed to the end of the fifteenth year as the time when persons are to be considered competent to manage their own affairs.<sup>1</sup>

This age was recognised as the age of majority <sup>Reg. X of 1793.</sup> for Hindus and Mahomedans by section 28 of Regulation X of 1793,<sup>2</sup> which declared that minority with respect to both Hindus and Mahomedans is limited to the expiration of the fifteenth year. That section was, however, rescinded by Regulation <sup>Reg. XXVI of 1793.</sup> XXVI of the same year, by which<sup>3</sup> the minority of Hindu and Mahomedan proprietors of estates,<sup>4</sup> paying revenue to Government, was declared to extend to the end of the eighteenth year.

This rule applied, whether the estates were permanently or temporarily settled;<sup>5</sup> and whether the proprietors were in or out of possession.<sup>6</sup> It applied

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<sup>1</sup> See the Preamble to Regulation XXVI of 1793.

<sup>2</sup> The Regulation which established the Court of Wards.

<sup>3</sup> Sec. 2. Regulation XXVI of 1793, was repealed by Act XXIX of 1871.

<sup>4</sup> By Sec. 3. This included joint undivided estates, for the management of which a surbarakar, or manager, was required to be appointed by the proprietors by section 23, Regulation VIII of 1793.

<sup>5</sup> *Huromonee Debi v. Tumeezoodeen Chowdhry*, 7 W. R. C. R. 181.

<sup>6</sup> See *Ranee Roshun Jahan v. Rajah Syud Enaet Hossain*, 5 W. R. C. R. 5; S. C. W. R., 1864, p. 83.

to co-sharers as well as to proprietors of entire estates.<sup>1</sup> This extension of the age of majority has also been held to refer to all acts done by such proprietors, both as to matters connected with their real estate and as to matters of personal contract.<sup>2</sup> Regulation XXVI of 1793 was never registered,<sup>3</sup> and therefore did not apply to Calcutta.

Act XL of  
1858.

The next enactment, affecting the age of majority of Hindus and Mahomedans in Bengal, was Act XL of 1858.<sup>4</sup>

That Act was passed for the purpose of making better provision for the care by the civil court of the persons and property of minors (not being European British subjects),<sup>5</sup> who had not been brought under the superintendence of the Court of Wards;<sup>6</sup> and for that purpose it was provided<sup>7</sup> that the care of the persons, and the charge of the property of such minors, should be subject to the jurisdiction of the civil court.

<sup>1</sup> W. R., 1864, p. 83.

<sup>2</sup> See *Bykuntath Roy Chowdhry v. N. P. Pogose*, 5 W. R. C. R. 2. Contra, *Seesanker Dass v. Ulick Chunder Aych*, 15 S. D. A. 889.

<sup>3</sup> See *In the goods of Gunga Prosad Gosain*, 5 B. L. R. 80, and 4 B. L. R. App. 43.

<sup>4</sup> The provisions of Act XL of 1858 are considered in Lecture IV, *post*.

<sup>5</sup> See sec. 2. The Act applied not only to proprietors of land paying revenue to Government, but to all persons not being European British subjects. *Lakkikant Dutt v. Jagabandu Chuckerbutty*, 3 B. L. R. App. 79; S. C. 11 W. R. C. R. 561.

<sup>6</sup> See the preamble to the Act.

<sup>7</sup> Sec. 2.



The 26th section of Act XL of 1858 is as follows—"For the purposes of this Act every person shall be held to be a minor who has not attained the age of eighteen years."

It was for some time doubtful whether the effect of this section was to cause a general extension of the age of majority, or whether its operation was confined to cases where the estate of the minor had been brought under the charge of the Civil Court. The latter construction was put upon it by the decisions of two Division Benches of the High Court;<sup>1</sup> but in the latter one of those two decisions the junior judge, Mr. Justice Phear, expressed his doubts as to the correctness of this view of the law. He there says:

"It seems clear from the words of section 20<sup>2</sup> of Act XL of 1858, taken together with section 26, that the jurisdiction of the Civil Court over the person and property of the minor continues until the age of eighteen, whether its intervention be invoked or not. If intervention does not take place before fifteen, then on attaining that age, according to the case above referred to,<sup>3</sup> the minor becomes of full

Mansur Ali  
v. Ramdyal.

<sup>1</sup> *Deobomoyee Dassee v. Juggessur Hati*, 1 W. R. C. R. 75, and *Mansur Ali v. Ram Dyal*, 3 W. R. C. R. 50.

<sup>2</sup> Sec. 20.—"If the disqualification of a person for whose benefit a suit shall have been instituted under this Act, cease before the final decision thereof, it shall be lawful for such person to continue the prosecution of the suit on his own behalf."

<sup>3</sup> *Deobomoyee Dassee v. Juggessur Hati*, 1 W. R. C. R. 75.

age, capable of legally exercising all rights of ownership in such a way as to bind himself and his property, and time commences to run against him in regard to any causes of action which he may possess. But during the succeeding three years, could not a next of kin apply to the Civil Court under section 3<sup>1</sup> of the Act, and obtain charge of the statutable minor's property? And if so, would not the statutable minority date back to the minor's birth, and cover the period during which he was, supposing the case of *Deobomoyee Dassee v. Juggessur Hati*<sup>2</sup> to be correct, legally dealing with his property *sui juris*? If this period does so become covered by the new minority, how are the minor's acts during that interval to be thereby affected; and will the circumstance that time (if such has been the case) has once commenced to run against the minor in any way alter the time of limitation to be again allowed him after he attains the age of eighteen? The difficulties above suggested as consequent on the decision quoted seemed to me to throw doubt on its correctness, and to lead to the inference that the legislature must have intended a somewhat more extended meaning to be given to the words "purposes of this Act" than is attributed to them in *Deobomoyee Dassee v. Juggessur Hati*.<sup>3</sup> If these

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<sup>1</sup> See *post*, Lecture IV.

<sup>2</sup> 1 W. R. C. R. 75.

<sup>3</sup> 1 W. R. C. R. 75.

words could be considered as equivalent to "relative to all that forms the subject of this Act," then the limit of minority, as regards the exercise of proprietary rights, would be fixed at eighteen years of age for all cases whatever, irrespective of whether the Civil Courts had intervened by any direct act or not, and all cause of anomaly would disappear."

Mr. Justice Phear's above opinion was confirmed, and his doubts set at rest, by the decision of a Full Bench of the High Court in the case of *Madhusudan Manjee v. Debigobinda Newgi*,<sup>1</sup> which practically reversed the rulings of the Division Benches in the case of *Monsoor Ali v. Ramdyal*<sup>2</sup> and *Deobomoyee Dasse v. Juggessur Hati*<sup>3</sup> above referred to. In *Madhusudan Manjee's* case, it was held that under the true construction of section 26 of Act XL of 1858, a person under the age of eighteen years was as much a minor for the purposes of the Act if proceedings had not been taken in the Civil Court for the protection of his property or for the appointment of a guardian of his person, as if such proceedings had been taken<sup>4</sup> under the Act.

The learned judge (Peacock, C. J.) who deli-

<sup>1</sup> 1 B. L. R. F. B. 49; S. C. 10 W. R. F. B. 36.

<sup>2</sup> 3 W. R. C. R. 50.

<sup>3</sup> 1 W. R. C. R. 75.

<sup>4</sup> Followed in *Tarinee Pershad Sein v. Dwarkanath Rukhit*, 15 W. R. C. R. 452; and *In the goods of Gunga Proshad Gosain*, 5 B. L. R. 81. See *Lakihant Dutt v. Jagabandhu Chuckerbutty*, 3 B. L. R. App. 79; S. C. 11 W. R. C. R. 561.

Madhusu-  
dan Manjee  
v. Debigobinda New-  
gi.

vered the judgment of the Full Bench, does not seem to have construed the words "for the purposes of this Act," though the effect of the decision is to show that these words bear the meaning attributed to them by Mr. Justice Phear, namely, that the words "for the purposes of the Act" in section 26 means "relative to all that forms the subject of the Act," and that, for all purposes relating to their property or to the custody of their persons, the age of majority of persons subject to Act XL of 1858 was eighteen years. This interpretation is in accordance with the ordinary rules for the construction of legislative acts, and it is a presumption of law that the legislature does not intend any alteration in the existing law beyond what it explicitly declares, either in express terms or by unmistakeable implication; or, in other words, beyond the immediate scope and object of the statute.<sup>1</sup> The immediate scope and object of Act XL of 1858 is to protect the persons and property of infants.

In another case Mr. Justice Phear held that Act XL of 1858 makes eighteen years the limit of minority for all purposes of contract.<sup>2</sup>

In the reference made to the Full Bench in *Madhusudan Manjee's* case,<sup>3</sup> Mr. Justice E. Jackson con-

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<sup>1</sup> Maxwell on the Interpretation of Statutes, 66.

<sup>2</sup> *Jadunath Mitter v. Bolye Chand Dutt*, 7 B. L. R. 607. See *Archer v. Watkins*, 8 B. L. R. 379.

<sup>3</sup> 1 B. L. R. F. B. 53.

sidered the words "for the purposes of this Act" to mean that, to enable the civil court to exercise its jurisdiction over the property and persons of minors up to a proper age, the law of minority which usually prevailed was declared to be altered and extended to eighteen years. In the same reference Mr. Jackson said—"I cannot read this law as having any other effect than altering the general law of minority, and in fixing one law for all minors not taken under the charge of the Court of Wards, and not European British subjects, *viz.*, eighteen years of age." There may be some doubt, however, whether the words "for the purposes of this Act" bear the whole of this construction, and whether in matters which are entirely independent of the exercise by the civil court of its jurisdiction over the persons and property of minors, the age of majority did not remain unaffected by the provisions of section 26.

The decision in *Madhusudan Manjee's* case does not seem to go so far as to declare that, for all purposes, the age of majority was altered by section 26 of Act XL of 1858, although that construction has been put upon it by a Division Bench of the High Court in the case of *Lakhikant Dutt v. Jagabandhu Chuckerbutty*.<sup>1</sup> *Madhusudan Manjee's* case only decided that, whether or not proceedings

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<sup>1</sup> 3 B. L. R. App. 79; S. C. 11 W. R. C. R. 561.

have been taken for the protection of his property, or for the appointment of a guardian of his person, every inhabitant of Bengal (not being a European British subject), who has not attained the age of eighteen years, is a minor for the purposes of Act XL of 1858; and the Full Bench did not travel outside that question, nor is there anything in their decision from which the interpretation put upon it in *Lakhi-kant Dutt's* case can be inferred. In a subsequent Full Bench case,<sup>1</sup> the court was of opinion that the word 'purposes' in section 26 referred to the sections preceding it,—namely to those providing for the appointment of managers of the property and guardians of the persons of minors. So Mr. Justice E. Jackson's exposition of the law does not seem to have been followed to the whole of its extent.

In one case<sup>2</sup> Mr. Justice Norman was of opinion that section 26 did not affect the testamentary capacities of those who had attained the age of majority according to Hindu and Mahomedan law. With respect to Hindus the Hindu Wills Act<sup>3</sup> removed this difficulty; but it still remained in the case of Mahomedans until the passing of Act IX of 1875.

It is also a question whether section 26 of Act XL of 1858 had any effect upon the capacity of

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<sup>1</sup> *Callychurn Mullick v. Bhuggobutty Churn Mullick*, 10 B. L. R. 240.

<sup>2</sup> See *In the goods of Gunga Prosad Gosain*, 5 B. L. R. 81.

<sup>3</sup> Act XXI of 1870, sec 2, incorporating sec. 46 of the Indian Succession Act (X of 1865).

persons to enter into a marriage contract. As we have seen, Mr. Justice Phear held<sup>1</sup> that that section made eighteen the limit of minority for all purposes of contract; but having in view the object of the Act, namely to protect the persons and property of infants, this decision would seem to have reference merely to such contracts as directly affect the custody of the persons, or the property, of persons subject to the Act. As a marriage contract does not *per se* directly affect the care of the persons or the property of those entering into it, it is very doubtful whether a Hindu or Mahomedan subject to Act XL of 1858, and who had concluded his fifteenth year, was not for the purposes of a marriage contract in the same position as if he were not so subject.

Act XL of 1858 has no operation in respect of minors who possess no property whatever; and their age of majority is not for any purpose altered by section 26 of that Act. Although the purpose of the Act is to provide for the protection as well of the persons as of the property of infants, the former purpose is apparently subordinate to the latter; and unless a certificate of administration to the estate of the minor be granted,<sup>2</sup> no guardian of his person can under the Act be appointed.

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<sup>1</sup> *Jadunath Mitter v. Bolye Chand Dutt*, 7 B. L. R. 607. See *Archer v. Watkins*, 8 B. L. R. 379.

<sup>2</sup> See secs. 7 and 11.

As we shall see in a future lecture,<sup>1</sup> a certificate of administration cannot be granted under the provisions of Act XL of 1858, unless the minor has a present right to, or prospective possession of, some property.<sup>2</sup>

Act XL of 1858 has no operation within Calcutta, and section 26 does not affect the age of majority of residents in Calcutta in respect to their acts in Calcutta, whether or not they may possess property in the mofussil. In the case of *Cally Churn Mullick v. Bhuggobutty Churn Mullick*<sup>3</sup> a Full Bench of the High Court decided that the age of majority of a Hindu, resident and domiciled in the town of Calcutta, and not possessed of property in the mofussil, is the end of the fifteenth year; and the same rule would by parity of reasoning apply to Mahomedans. In delivering the judgment of the Full Bench, Couch, C. J. said:—"The question depends upon what is meant in section 26 by the words 'for the purposes of this Act, every person shall be held to be a minor who has not attained the age of eighteen years.' The title of the Act is 'an Act for making better provision for the care of

Callychurn  
Mullick v.  
Bhuggo-  
butty  
Churn  
Mullick.

<sup>1</sup> See *post*, Lecture IV.

<sup>2</sup> See *Nobin Chunder Shaha v. Rajnarain Shaha*, 9 W. R. C. R. 582; *Saroda Soonduree Dossee v. Tarinee Chunder Chowdhry*, 6 W. R. M. A. 23. *Ranee Mookhta Jamma v. Pat Mohadabee*, 16 S. D. A. Rep. 376.

<sup>3</sup> 10 B. L. R. 240; S. C. 19 W. R. C. R. 110. See *Jodunath Mitter v. Bolyechand Dutt*, 7 B. L. R. 607; and *Archer v. Watkins*, 8 B. L. R. 372.



the persons and property of minors in the Presidency of Fort William in Bengal.' If we looked only at the title, and section 26, we might say that the town of Calcutta was within the purposes of the Act, it being included in the Presidency of Fort William. But the title of an Act, although it may sometimes aid in the construction of it, is not a safe exposition of the law, being often loosely and carelessly inserted. And there is the established rule that, in the exposition of statutes, the intention is to be deduced from a view of the whole, and of every part taken and compared together. The general statement in the title and preamble of the Act is not sufficient to show what are its purposes. We must look for them in the provisions which are made in it. The purpose is stated generally in section 2, *viz.*, the subjecting to the jurisdiction of the Civil Court the care of the persons of all minors (except European British subjects), and the charge of their property, except proprietors of estates 'who have been or shall be taken under the protection of the Court of Wards.' The sections which follow contain provisions for effecting this, and are followed by section 26. We think the word 'purposes' there refers to the provisions in the preceding sections. Then section 29 defines the expression 'civil court' as used in the Act to be the principal court of original jurisdiction in the district, and not to include the Supreme Court; conse-

quently, none of the powers conferred by the Act could be exercised within the jurisdiction of the Supreme Court. The proviso that nothing contained in the Act should be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction was unnecessary, and seems to have been inserted from abundant caution.

“We think the construction which was first put upon the Act, that it did not alter the Hindu law in Calcutta as to the age of majority, was the right one; and that such a change was not intended by the legislative authority when the Act was passed. If it is desirable that the law should be uniform in Calcutta and the mofussil, it may be made so by the legislature without affecting existing titles, which must be affected by a decision of this court, as we should declare what the law has been since the passing of Act XL of 1858. As to Phear, J.’s reason that we ought not to attribute to the legislature the intention to set up for the same person two standards of majority, one to prevail in the mofussil, and the other in Calcutta, we think the answer is, that two standards have been set up in the mofussil by Regulation XXVI of 1793, and it was the state of the law until Act XL of 1858 was passed.”

In this case the court expressly declined to decide the question as to how far Act XL of 1858

might operate upon a person resident in the town of Calcutta and having property in the mofussil; but it was subsequently decided by a Full Bench of the High Court in the case of *Mothoormohun Roy v. Soorendro Narain Deb*,<sup>1</sup> that the age of majority of Hindus resident in Calcutta was not affected by their possession of property in the mofussil, and that where a Hindu resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, and agreed by his bond to repay the principal with interest in Calcutta, the law as to the age of majority governing the case was not Act XL of 1858, but the Hindu law. With reference to the inconvenience of there being two ages of majority, one for the mofussil, and another for Calcutta, Macpherson, J., said in his judgment in that case:—"A good deal has been said about anomaly and inconvenience. In *Madhusudan Manjee's case*,<sup>2</sup> the Full Bench, dealing with persons living in the mofussil, and courts in the mofussil, deemed it anomalous and inconvenient that there should be more than one age of majority in the mofussil. And the Full Bench may have been justified in drawing inferences based on its sense of that inconvenience and anomaly. But those inferences could not properly have been

*Mothoor-  
mohun Roy  
v. Sooren-  
dro Narain  
Deb.*

Remarks of  
Macpherson, J., as  
to inconvenience of  
two ages of  
majority.

<sup>1</sup> 1 I. L. R. C. S. 108 ; S. C. 24 W. R. C. R. 464.

<sup>2</sup> 1 B. L. R. F. B. 49 ; S. C. 10 W. R. F. B. 36.

drawn had the question been as to the age of majority of Hindus residing in Calcutta. It might be improbable that the legislature would sanction anything so inconvenient as two possible ages of attaining majority in the mofussil, where one general law was supposed to prevail. But no such improbability could exist as regards Calcutta and the mofussil taken together, inasmuch as the whole substantive law prevailing in Calcutta (and indeed the law of procedure also) was in 1858 avowedly different from that in the mofussil. The position of the parties as to both their persons and their property differed in innumerable respects according as they happened to reside in Calcutta or in the mofussil, and many such differences exist up to the present day. Therefore, the argument based on anomaly and inconvenience which was referred to by the Full Bench in *Madhusudan Manjee's* case has no applicability to the question now before us."

It must be remembered, however, that in the case of *Mothoormohun Roy v. Soorendro Narain Deb*,<sup>1</sup> the contract was made and the suit was brought in Calcutta, and this decision does not affect the age of the majority of Hindus possessed of property in the mofussil (though their usual place of residence be in Calcutta) in respect of contracts made by them outside Calcutta.

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<sup>1</sup> 1 I. L. R. C. S. 108 ; S. C. W. R. C. R. 464.

In questions of minority or majority the law applicable is generally the law of the place where the contract is made or the act done.<sup>1</sup>

*The lex loci contractus governs question of minority.*

Mr. Burge in his Commentaries on Colonial and Foreign Law<sup>2</sup> says: "The obstacles to commercial intercourse between the subjects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicile of the person with whom he is dealing, whether the latter has attained the age of majority, and consequently whether he is competent to enter into a valid and binding contract. If the country in which the contract was litigated was also that in which it had been entered into, and if the party enforcing it were the subject of that country, it would be unjust as well as unreasonable to invoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state."

The same author further says:<sup>3</sup> "It has been hitherto assumed that, according to the law of the domicile, the person was a minor and incapable of contracting although he had attained the age which *in loco contractus* constituted majority, and where

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<sup>1</sup> Story on the Conflict of Laws, § 103.

<sup>2</sup> London 1838, Pt. i, chap. iv, p. 132.

<sup>3</sup> Part i, chap. iv, p. 133.

according to that law he was competent to contract. In such a case it has been submitted that the *lex loci contractûs* ought to be followed. It ought also to be followed if the converse of that case occurred, and he had attained majority according to the law of his domicile, but was a minor according to that which prevailed *in loco contractûs*. It is true in the latter case, the party was subject to no greater liability than he would have incurred in the place of his domicile. But if the principle be correct, that the *lex loci contractûs* ought to determine the validity of a contract, when that validity depends on the capacity of the contracting party, it must be uniformly applied, whether the law prevailing in the domicile be that which capacitates or incapacitates. For it would not be reasonable that two different laws should be applied to one and the same contract, and that the liability of one of the parties should be decided by the *lex loci contractûs*, and that of the other by the *lex loci domicilii*."

This seems to show that when the contract is made in the mofussil, the age of majority fixed by section 26 of Act XL of 1858 is applicable, whether the suit on the contract be brought within or without the ordinary original civil jurisdiction of the High Court at Fort William. Majority being a question not of procedure, but of capacity, the *lex fori* has no application, and as we have seen the law govern-

ing the case is *the lex loci contractûs* and not the *lex domicilii*.

The fact that the minor's place of residence is in Calcutta does not alter his status outside that town, and he remains a minor for all the purposes of the Act XL of 1858, until he has attained his eighteenth year ; although in respect of all his acts in Calcutta he attained his majority at the end of his fifteenth years.

Proprietors of estates paying revenue to Govern-<sup>The Court of Wards.</sup>ment, who had been or should be taken under the protection of the Court of Wards were, as we have seen above, expressly exempted from the provisions of Act XL of 1858. By the Court of Wards Act<sup>1</sup> which placed under the superintendence of the Court of Wards all minor proprietors of entire estates (other than proprietors who were subject to the jurisdiction as respects infants of a High Court)<sup>2</sup> the word 'minor' was defined<sup>3</sup> as a person under the age of eighteen years.

This definition of the word 'minor' would, I apprehend, be construed to affect the general law as to the age of majority to an extent similar to that to which it was affected by section 26 of Act XL of 1858 ; and that for all purposes of contract, and indeed for everything relative to the property and persons of those subject to the Court of Wards, it

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<sup>1</sup> Act IV (B.C.) of 1870.

<sup>2</sup> Sec. 2.

<sup>3</sup> Sec. 1.

would be held that the Court of Wards Act had declared their minority to extend to the end of the eighteenth year.

European  
British  
subjects.

European British subjects are, as we have seen, exempted from the operation of Act XL of 1858.

Their age  
of majori-  
ty.

Before the passing of Act IX of 1875, the age of majority of European British subjects was regulated by the English law, which fixed the limit of minority at the end of the twenty-first year;<sup>1</sup> and in the term "European British subjects" are included not only such British subjects as have themselves migrated to and become domiciled in India, but also all their legitimate descendants, however remote their descent.<sup>2</sup> The mere possession of an English name will not apparently be sufficient to justify the inference that the person possessing it is a European British subject. There must be a distinct descent from a person of European extraction who has migrated to India.<sup>3</sup>

Who are  
European  
British  
subjects.

It is doubtful, however, whether the rule laid down by Markby, J., in *Rollo v. Smith*,<sup>4</sup> viz., that the legitimate descendants of a European British subject, however remote their descent, retain the laws of their ancestor, and therefore, as being Euro-

<sup>1</sup> *Rollo v. Smith*, 1 B. L. R. O. C. 10. See also *Sultan Chand v. Smyth*, 12 B. L. R. 358.

<sup>2</sup> *Rollo v. Smith*, 1 B. L. R. O. C. 10.

<sup>3</sup> *Archer v. Watkins*, 8 B. L. R. 372.

<sup>4</sup> 1 B. L. R. O. C. 10.



pean British subjects, are excluded from the operation of Act XL of 1858, is equally applicable whether that ancestor be male or female. This question was raised but not determined in the case of *Sultan Chand v. Smyth*,<sup>1</sup> where the person, whose status was under dispute, was the son of a man of Portuguese extraction having an Indian domicile by his wife, who was a native of Ireland.

In the case of *Archer v. Watkins*<sup>2</sup> the evidence showed that James Archer, the father of the defendant, was born at sea, and lived the greater part of his life in Calcutta. It was not shown of what country his parents were, or whether the ship on which he was born was a British ship. Phear, J. on these facts held that the defendant's age of majority was not governed by the English law; but that the provisions of Act XL of 1858 were applicable to the case, and that therefore, on the authority of the cases of *Madhusudan Manjee v. Debigobinda Newgy*,<sup>3</sup> and *Jadunath Mitter v. Bolye Chand Dutt*,<sup>4</sup> the defendant, although resident in Calcutta, attained her majority at the end of her eighteenth year. But now that it has been expressly decided<sup>5</sup> that the provisions of Act XL of 1858 cannot be applied to Calcutta, the effect of Phear, J.'s

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<sup>1</sup> 12 B. L. R. 358.

<sup>2</sup> 8 B. L. R. 372.

<sup>3</sup> 1 B. L. R. F. B. 49; S. C. 10 W. R. F. B. 36. <sup>4</sup> 7 B. L. R. 607.

<sup>5</sup> 10 B. L. R. 231; S. C. 19 W. R. C. R. 110, *ante* p. 16.

decision in *Archer v. Watkins* is confined to the mofussil, and it is not easy to say what would now be held in a case similar to that of *Archer v. Watkins*. In a suit on the Original Side of the High Court the English law would be considered to be applicable. The 19th section of the High Court Charter<sup>1</sup> provides that the High Court, in the exercise of its original jurisdiction, shall apply such law or equity which would have been applied by the High Court to such case if the Charter had not issued. The law to be administered by the High Court is, therefore, the same as that which had before been administered by the Supreme Court, and from that law<sup>2</sup> it seems that the age of majority of the defendant in the case of *Archer v. Watkins* would have been held to be governed by the English common law, and to be therefore the end of the twenty-first year.

East In-  
dians and  
Native  
Christians.

Jews.

This rule would apparently also apply to East Indians, to native Christians who had renounced the old law by which they were bound,<sup>3</sup> and to Jews, and also in fact to all persons other than Hindus and Mahomedans.<sup>4</sup> With respect to the

<sup>1</sup> 1865.

<sup>2</sup> See a letter from the Judges of the Supreme Court at Calcutta, dated 16th October, 1830, printed in Morley's Digest, Vol. I, p. xxii of the Introduction.

<sup>3</sup> See *Abraham v. Abraham*, 9 M. I. A. 196, and *Hogg v. Greenway*, 2 Hyde 3; S. C. 1 Cor. 97.

<sup>4</sup> See *Musleah v. Musleah*, 1 Boul., p. 234.

illegitimate children of native women by European British subjects, the limit of their minority would be determined by the Hindu,<sup>1</sup> Mahomedan, or English law, according as they had been brought up as Hindus, Mahomedans, or Europeans.

Thus we see that before the passing of Act IX Result. of 1875, the general age of majority in Bengal for Hindus and Mahomedans was the end of the fifteenth year; for all subject to the provisions of Act XL of 1858, and to the Court of Wards Act<sup>2</sup> the end of the eighteenth year; and for European British subjects and others being neither Hindus, Mahomedans, nor subject to the provisions of Act XL of 1858 or of the Court of Wards Act, the end of the twenty-first year.

To add to the complications of the law as to the age of majority before the passing of Act IX Age of majority for special purposes. of 1875, there are several Acts fixing the age of majority for the special purposes of such Acts. In the Succession Act,<sup>3</sup> which applies to<sup>4</sup> all persons except Hindus, Mahomedans and Buddhists, the word 'minor' is interpreted<sup>5</sup> to mean any person who shall not have completed the age of eighteen years; but this definition does not apply to cases in which a person enters into a contract on his own behalf, and not in any representative capacity

<sup>1</sup> *Myna Bayee v. Dataram*, 8 M. I. A., 400.

<sup>2</sup> Act IV (B. C.) of 1870. <sup>3</sup> Act X of 1865. <sup>4</sup> Sec. 331. <sup>5</sup> Sec. 3.

under that Act.<sup>1</sup> It has reference only to the provisions of the Act itself and to cases of intestate and testamentary succession.

The definition of 'minor' in the Succession Act was also incorporated into the Hindu Wills Act.<sup>2</sup>

In the Limitation Act IX of 1871,<sup>3</sup> and the Government Savings Bank Act,<sup>4</sup> a similar definition is given of the word 'minor.' Under the Indian Christian Marriage Act of 1872,<sup>5</sup> the word 'minor' is defined as a person who has not completed the age of twenty-one years, and who is not a widower or a widow.

The Indian  
Majority  
Act, 1875.

We have now seen what was the state of the law with respect to the age of majority of the inhabitants of Bengal before the passing of the Indian Majority Act,<sup>6</sup> which, as its preamble states, was passed for the purpose of prolonging the period of nonage, and of attaining more uniformity and certainty respecting the age of majority. It is doubtful how far it has brought about the latter result.

The Indian Majority Act provides<sup>7</sup> that "every

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<sup>1</sup> *Sultan Chand v. Smyth*, 12 B. L. R. 358.

<sup>2</sup> Act XXI of 1870, s. 6.

<sup>3</sup> There is no definition of the word 'minor' in the new Limitation Act (XV of 1877).

<sup>4</sup> Act V of 1873.

<sup>5</sup> Act XV of 1872.

<sup>6</sup> Act IX of 1875. It came into operation on the 2nd of June, 1875.

<sup>7</sup> Sec. 3.

minor of whose person or property a guardian<sup>1</sup> has been or shall be appointed by any court of justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed the age of twenty-one years, and not before."

The Majority Act further provides<sup>2</sup> that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. Nothing in this Act, however, is to affect<sup>3</sup>—

(a) the capacity of any person to act in the following matters (namely) marriage, dower, divorce, and adoption;<sup>4</sup>

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<sup>1</sup> This does not include a guardian *ad litem*—s. 443 of the Civil Procedure Code (Act X of 1877).

In the case of *Suttya Ghosal v. Suttayanand Ghosal*, 1 I. L. R. C. S., 388, decided before the passing of Act X of 1877, *Pontifex, J.*, held, that a minor defendant, of whom a guardian *ad litem* has been appointed in a suit, is a "minor of whose person or property a guardian has been appointed by a court of justice" within the meaning of the Majority Act, at all events so far as relates to the property in the suit. It is, however, difficult to see how a guardian *ad litem* can be said to be a guardian of the person or property of a minor, as he has no powers over either the one or the other, and is merely a person appointed by the Court to conduct the infant's defence, and act in his behalf in the suit or matter.

<sup>2</sup> Sec. 3.

<sup>3</sup> Sec. 2.

<sup>4</sup> See *post*, Lecture VIII.

(b) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or

(c) the capacity of any person who before this Act came into force had attained majority under the law applicable to him.

When once a person who has not had a guardian of his person or property appointed by a Court of justice, and who is not subject to the jurisdiction of the Court of Wards, has attained the age of eighteen years, he cannot be again reduced into a state of pupillage by a guardian of his person or property being appointed. This is obvious, as in the absence of an express legislative enactment no Court of justice has power to appoint a guardian of a person who has attained the age of majority, and no such power is given to Courts of justice by the Indian Majority Act.

It may have been the intention of the framers of the Indian Majority Act to fix the ages of eighteen and twenty-one, respectively, as the periods of the attainment of majority for all purposes; but as the Act stands, it is difficult to see what effect it has on those Acts in which the word 'minor' is specially interpreted for particular purposes. The words "notwithstanding any thing contained in the Indian Succession Act (No. X of 1854) or in any other enactment," for whatever purposes they may have been intended, are too vague to set this difficulty at rest. For instance,

where a person is of the class, the age of majority of which is fixed by the Indian Majority Act at twenty-one years of age, does that Act alter the period of which limitation commences to run under the Limitation Act (IX of 1871)?<sup>1</sup>

In that latter Act the word 'minor' is defined as a person who has not completed the age of eighteen years. This express interpretation of the word 'minor' for the purposes of the Act seems to exclude all consideration of the general law as to the age of majority ; and this will be more apparent when it be remembered that at the time of the passing of the Limitation Act the end of the eighteenth year was not the age of majority except for persons subject to the operation of Act XL of 1858, or under the jurisdiction of the Court of Wards.

As the Indian Majority Act does not repeal or alter these special definitions of majority for particular purposes, it seems that they remain as they were. This result, namely, that at a particular age a person is for some purposes a minor, and for others an adult, is capable of causing great inconvenience as Phear, J., points out in *Mansur Ali v. Ramdyal*.<sup>2</sup>

There is another difficulty connected with the Indian Majority Act, and that is with respect to

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<sup>1</sup> This difficulty does not exist in the new Limitation Act (XV of 1877).

<sup>2</sup> 3 W. R. C. R. 50.

its effect upon the Court of Wards Act (IV B. C. of 1870), and on Act XL of 1858. Both these Acts place eighteen years as the limit of minority of persons subject to their provisions. Is it the intention of the Indian Majority Act to substitute throughout in those Acts 'twenty-one years' for 'eighteen years'? If that were so, it would be in the power of the civil courts to appoint guardians to persons subject to the jurisdiction at any time up to the age of twenty-one years. This apparently is not the intention of the Act. The words "of whose person or property a guardian has been or shall be appointed," seem to show that it is the intention of the third section of this Act to extend to twenty-one years the pupilage only of those persons whose guardians have been appointed by a Court of justice, before they attained the age of eighteen years.

If the words "*every minor under the jurisdiction of any Court of Wards*" mean 'minor' who is *subject* to the jurisdiction (that is to say, liable to be brought under the superintendence) of a "Court of Wards," a person whose estate has not been brought under the Court of Wards would not attain his majority till twenty-one; but if on the other hand those words mean "*every minor who has been brought under the jurisdiction of the Court of Wards,*" then such person would attain his majority at 18.



The first interpretation would, perhaps, be arrived at by an argument similar to that which formed the basis of the judgment of the Full Bench in *Madhusudan Manjee's case*.<sup>1</sup>

Then again does the Indian Majority Act empower the civil courts and the Court of Wards to continue their authority over persons who have attained the age of eighteen years? Certainly the letter of the Majority Act does not extend these powers; and as the age up to which the civil courts acting under Act XL of 1858, and the Court of Wards acting under Act IV (B. C.) of 1870, can exercise their powers is quite independent of the general law as to the age of majority, it is difficult to see what, if any, effect the Indian Majority Act has upon these powers.

In short, the alteration in the law made by the Indian Majority Act is confined to the general status of a minor with reference to contracts, and the disposal of his residence, and education,<sup>2</sup> and in accordance with the legal principle that "*generalia specialibus non derogant*," the special definitions of the word 'minor,' given by particular Acts for their own purposes, remain unaffected by the provisions of the new Act.

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<sup>1</sup> 1 B. L. R. F. B. 49; S. C. 10 W. R. F. B. 36.

<sup>2</sup> See Supplement to *Gazette of India*, January to June 1874, p. 669.

When age  
of majority  
completed.

By the Indian Majority Act<sup>1</sup> in computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he be under the jurisdiction of the Court of Wards, or if a guardian of his person or property shall have been appointed by a Court of justice at the beginning of the twenty-first anniversary of that day, and if he be not under the Court of Wards, and no guardian have been appointed of his person or property by a Court of justice at the beginning of the eighteenth anniversary of that day. This is different to the English law, which in this respect was in force in Bengal before the passing of the Majority Act. By that law the last year of minority is looked upon as completed on the first instant of the day before the birth-day, which closes that year.<sup>2</sup>

Persons not  
domiciled  
in British  
India.

As the Indian Majority Act only applies to persons domiciled in British India, the age of majority of persons who are not so domiciled will, in respect of acts done by them in British India, be still determined by the law which was in force before the passing of that Act.

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<sup>1</sup> Act IX of 1875, sec. 4.

<sup>2</sup> See Simpson on the law of Infants, 3. Macpherson on ditto, 447, and cases there cited.

With respect to testamentary succession, where a testator fixes an age subsequent to the age of majority as the age at which his beneficiary shall enjoy his legacy, and at the same time gives the legatee an absolute vested interest in the legacy, according to English law<sup>1</sup> the legatee is entitled to payment of the legacy on attaining the age of majority. This rule is apparently applicable to this country.<sup>2</sup>

The testator can, however, postpone the vesting of his legacy,<sup>3</sup> but beyond this the testator would have no power to extend the age of majority of his beneficiary.

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<sup>1</sup> See Williams on Executors, 7th edn., p. 1398.

<sup>2</sup> See however *Ranee Hurrosoondery v. Cowar Kistonath Roy*, 1 Fulton 393; See also *In the goods of Gunga Prosad Gosain*, 5 B. L. R. 80.

<sup>3</sup> See Act X of 1865, sec. 107.

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## LECTURE II.

### THE RIGHT OF GUARDIANSHIP, NATURAL AND TESTAMENTARY.

THE incapacity of infants necessarily requires that the law should make some provision for the care of their persons and property by adult persons willing and able to look after the interests of the infants committed to their charge. The persons to whom the law intrusts the care of the persons and the custody of the estates of infants are termed their *guardians*.

Who cannot be guardians. No person who is himself a minor, an idiot, or insane, or is a registered eunuch<sup>1</sup> can act as guardian of the person or estate of a minor.

The courts of law have power, under certain circumstances, which will be discussed in future lectures, to appoint guardians of the persons and estates of infants, but, independently of such appointment of guardians by a civil court, the law recognized the natural right of the relations of minors to the guardianship of their persons and property.

Hindu law. By the Hindu law, the ruling power is, in every instance, whether the natural and legal guardians

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<sup>1</sup> Act XXVII of 1871, sec. 29, extended to Lower Bengal by Act VII of 1876.

be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female.<sup>1</sup>

Menu says<sup>2</sup>—"The property of a student and of Menu. an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year."<sup>3</sup>

It belongs to the courts of law as representing the sovereign to protect the rights of minors; and in deciding as to who is entitled to the care and custody of a minor and his property, the courts, when no distinct rule is to be found, must exercise their discretion as may be most advantageous for the interests of the minor, being guided by such principles of Hindulaw as may be applicable to the case, and selecting at the same time the fittest among the minor's relations, if there be suitable persons of that class.<sup>4</sup> The Hindu law does not seem to prescribe any positive rules with respect to the rights of guardianship; but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law. For instance, the rights

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<sup>1</sup> Macnaghten's Hindu Law, Vol. I, chap. vii, edn. 1829, p. 104. Colbrooke's Digest, edn. 1801, p. 542, Vol. III, chap. viii, ss. 449, 450.

<sup>2</sup> Chap. viii, verse 27.

<sup>3</sup> The end of the fifteenth year was, according to the Bengal school of Hindu law, the age of majority.

<sup>4</sup> See *Maharane Ram Bunsee Koonwaree v. Maharane Soobh Koonwaree*, 7 W. R. C. R. 325; S. C. 2 Ind. Jur. N. S. 193.

of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable.

Right of  
father to  
guardian-  
ship.

A Hindu father, whether natural or adoptive, is recognized as the legal guardian of his male and female infant children:<sup>1</sup> of the former, until they attain the age of majority; and of the latter, until they be disposed of in marriage.<sup>2</sup>

This rule, however, does not apply to the case where the father is a coolin Brahmin, practising coolinism, who having several wives does not reside with the mother of the infant, but only occasionally visits her. In that case the mother is the natural guardian of her infant children.<sup>3</sup>

Nomina-  
tion of  
guardian  
by father.

Under the Hindu law a father can, by word or writing, nominate a guardian for his children, and he is unrestricted in the choice of such guardian. He may even exclude the mother from the guardianship of her children.<sup>4</sup>

Power re-  
cognised  
by the Go-  
vernment.

The capacity of Hindu and Mahomedan fathers to appoint by their wills guardians for their children after their deaths, has been recognized by the sovereign power of this country since the date of

<sup>1</sup> Macnaghten's Hindu Law, Vol. I, chap. vii. See *In the matter of Himnauth Bose*, 1 Hyde 111.

<sup>2</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104.

<sup>3</sup> See *Modhoosoodun Mookerjee v. Jadub Chunder Banerjee*, 3 W. R. C. R. 194.

<sup>4</sup> See *Soobah Doorgah Lal Jha v. Rajah Neelanund Singh*, 7 W. R. C. R. 74.

the Permanent Settlement.<sup>1</sup> Regulation V of 1799, s. 2, provided that, in ordinary cases, the executor or executors appointed by the will of the deceased should "take charge of the estate of the deceased, and proceed to the execution of their trust according to the will of the deceased and the laws and usages of the country, without any application to the Judge of dewanny adawlut, or any other officer of Government for his sanction;" and Act XL of 1858, the provisions of which I shall in a future lecture consider, in enacting a procedure for the appointment by the court of a guardian to the persons and estates of minors in the mofussil, expressly<sup>2</sup> commands the court to grant a certificate of administration of the property of the infant to any person claiming under a will or deed the right to have charge of such property, and who is willing to undertake the trust; and no discretion is left to the court where such a person applies to be appointed manager of the infant's property,<sup>3</sup> and the will or deed under which he claims is proved to be genuine. The

Reg. V of  
1799.

Act XL of  
1858.

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<sup>1</sup> See Markby's Lectures on Indian Law, Lecture V, p. 76.

<sup>2</sup> Sec. 7. The Court of Wards, in appointing a guardian, must prefer a testamentary guardian, unless he be disqualified or unfit. See Act IV (B. C.) of 1870, sec. 31, *post*, Lecture III.

<sup>3</sup> *Puroma Soonderee Dossee v. Tara Soonderee Dossee*, 9 W. R. C. R. 343. Similar decision in *Roodur Chund Roy v. Bhoobun Mohun Acharjee*, 16 S. D. A. 350; and in *Bhoobun Mohinee Dabee v. Poorna Chunder Banerjee*, 17 W. R. C. R. 99.

same section,<sup>1</sup> which contains the above provision, goes on to say that, unless a guardian have been appointed by the father, the court may appoint such person or a near relative or any other relative or friend to the charge of the person of the minor. Thus the provisions of Act XL of 1858, for the appointment of guardians to the persons of minors, specially include the case of an appointment by the father, and prevent the courts from interfering with a guardian who has been so appointed.

The Hindu  
Wills Act.

The Hindu Wills Act,<sup>2</sup> which applies to the wills of Hindus, Jains, Sikhs, and Buddhists, does not alter the testamentary powers of Hindus to appoint guardians for their children. Although the rest of Part VII of the Indian Succession Act<sup>3</sup> is incorporated into the Hindu Wills Act, section 47, which gives to fathers, adult or minor, the power to appoint by will guardians for their infant children, is not so incorporated. The Hindu Wills Act does not take away the powers possessed by Hindu fathers before the passing of that Act; but by not incorporating section 47 of the Indian Succession Act into the Hindu Wills Act, the Legislature has shown that it did not consider it advisable to extend to minor fathers the privileges enjoyed by adult fathers.

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<sup>1</sup> Sec. 7, see *post*, Lecture IV.

<sup>2</sup> XXI of 1870.

<sup>3</sup> X of 1865.



Before all other relations after the father, the mother is, according to Hindu law, entitled to the guardianship of her infant children.<sup>1</sup> As under the Hindu law women are in a perpetual state of tutelage,<sup>2</sup> and inasmuch as a woman cannot perform the initiatory rites necessary in the case of male children, and moreover cannot of herself give her female children in marriage, the rights of the mother to be guardian were not originally allowed; but by custom and practice the mother has acquired the right of guardianship to the persons and property of her children, exclusive of any right to perform their initiatory ceremonies, or to give them in marriage, and this right is now unquestionable.<sup>3</sup>

Right of  
mother to  
guardian-  
ship.

If the family of the infant be a joint Hindu family, the *kurta* of the family would be entitled to the management of the infant's property; but if the family is a divided one, the mother is entitled to such management.<sup>4</sup> Where, however, the mother is manager of her infant child's property, she must

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<sup>1</sup> Macnaghten's Hindu Law, edn. 1829, Vol. II, chap. vii, case iv, p. 205.

<sup>2</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104.

<sup>3</sup> See *Kooldeep Narain v. Rajbunsee Kowur*, 7 Sel. Rep. 395. Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 103; and Vol. II, chap. vii, case iv, p. 205.

<sup>4</sup> Sir. E. H. East's notes, Morley's Digest, II, p. 50.

act under the advice and control of her husband's relations.<sup>1</sup>

Step-  
mother.

Where the mother is dead the stepmother of the infant is not its legal guardian, at any rate in preference to the paternal relations. In 1821 it was held by the Bombay Sudder Court in the case of *Lukmee v. Umur Chund Deo Chund*,<sup>2</sup> that the stepmother, in preference to the paternal uncle, was the legal guardian of a minor; and there is a similar decision by a single Judge of the Sudder Court of the North-Western Provinces;<sup>3</sup> but a Division Bench of the Bengal High Court (Loch and Macpherson, JJ.) has held<sup>4</sup> that the paternal grandmother has a right to the guardianship of a Hindu minor in preference to the stepmother. The only authority for the decision of the Bombay Court seems to be the statement in the institutes of Menu:<sup>5</sup> "Thus, if among all the wives of the same husband one bring forth a male child, Menu has declared them all, by means of that son, to be mothers of male issue."<sup>6</sup> As to this Macpherson, J., in delivering the judgment of

<sup>1</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 103; and see Sir E. H. East's notes, Morley's Digest, II, p. 50.

<sup>2</sup> 2 Bom. Sud. Ct. Rep. 144.

<sup>3</sup> *Nunkoolal v. Musst. Shoodra*, Decisions for 1847, p. 115.

<sup>4</sup> *Maharanee Ram Bunsee Koonwaree v. Maharanee Soobh Koonwaree*, 7 W. R. C. R. 321; S. C. 2 In. Jur. N. S. 193.

<sup>5</sup> Chap. ix, verse 183.

<sup>6</sup> 7 W. R. C. R. 321; S. C. 2 In. Jur. N. S. 193.

the court in the case of *Maharanee Ram Bansee Koonwaree v. Maharanee Soobh Koonwaree*,<sup>1</sup> says: "This verse, however, does not, in our opinion, justify the conclusion arrived at by the shastrees and the court.<sup>1</sup> It may be that the existence of a son by one wife may, according to Hindu law, put all the wives of the son's father in the position of mothers in a religious point of view, and as regards their future state; but it by no means necessarily follows that all the wives are, therefore, in the same position towards the child as its actual mother. Menu does not say that the stepmother is to stand in all things in the same position towards the son as his mother, and if it be clear and settled law that she does *not* do so in some respects, we fail to see anything in the verse referred to which leads directly or indirectly to the inference that she stands in that position as regards guardianship. That she does not stand as a mother for all purposes is unquestionable. For under no circumstances can she inherit from her stepson.<sup>2</sup> If the text of Menu does not make the stepmother a mother so that she may inherit, we cannot see what there is in the text which makes her a mother

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<sup>1</sup> Referring to the decision of the Bombay Sudder Court in 1821, in the case of *Lukmee v. Umur Chund Deo Chund*, 2 Bom. Sud. Ct. Rep. 144.

<sup>2</sup> See *Lalla Jotee Lal v. Mussamat Dooranee Koer*, W. R. F. B. R. 173.

so as to make her the legal guardian." And in the same judgment Macpherson, J., further says: "It appears to us that the paternal grandmother is a relative of the minor's more fitting as a rule to be selected as guardian than is the stepmother, because we are of opinion that her appointment as guardian is the more likely to be for the minor's interests, and is the appointment most in accordance with the general principles of Hindu law. When we find that under no circumstances can a stepmother inherit from her stepson,<sup>1</sup> and that on partition the stepmother does not get a share, because she is not included in the term 'mother';<sup>2</sup> and when we find that the grandmother can inherit from her grandson (a point as to which there can be no dispute, and on which it is, therefore, unnecessary to refer to authorities), we cannot but come to the conclusion that, according to Hindu law, the connection between the paternal grandmother and her grandchild is to be deemed closer than the connection between the child and its stepmother. Blood relationship, especially on the father's side, is usually preferred by Hindu law. In the case of the paternal grandmother, we have that relationship; in the case of the stepmother, we have it not."

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<sup>1</sup> *Lalla Jotee Lal v. Mussamut Dooranee Koer*, W. R. F. B. R. 173.

<sup>2</sup> *Dyabhaga*, chap. iii, sec. 2, cls. 29, 30.

On the death of the mother, or in the event of her being disqualified from acting as the guardian of her children,<sup>1</sup> the elder brother,<sup>2</sup> or in default of him the elder half-brother<sup>3</sup> is entitled to the guardianship both of the person and property of the infant in preference to the grandmother and all others.

Right of  
elder brother.

Elder half-  
brother.

After these, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen according to their degree of proximity.<sup>4</sup>

Paternal  
relations.

Maternal  
relations.

After marriage the right of guardianship of the person and property of a female minor devolves upon her husband and his kindred.<sup>5</sup>

Guardian-  
ship of  
female mi-  
nor after  
marriage.

The husband is the legal guardian of his wife's person and property, whether she is an adult or a minor. The marriage of an infant being, under the Hindu law, a legal and complete marriage, the husband has the same right, as in other cases, to demand that his wife shall reside in the same house as himself, except under special circumstances such as absolve the wife from that duty and her parents or

<sup>1</sup> *Mussamut Muhtaboo v. Ganesh*, 10 S. D. A. 329; and *In the matter of Ishwar Chunder Surma*, 6 S. D. A. 471.

<sup>2</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 103; and 6 S. D. A. 471.

<sup>3</sup> *Mussamut Muhtaboo v. Ganesh*, 10 S. D. A. 329.

<sup>4</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104.

<sup>5</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104; Colebrooke's Digest, edn. 1801, Vol. II, pp. 380 and 384 Bk. iv, chap. 1, cls. 4, 5, and 12.

guardians from the duty of surrendering her to her husband. The infancy of the wife does not of itself constitute such a ground, and this right of the husband seems to be independent of the question whether the infant is physically fit to perform the duties of a wife.<sup>1</sup> In giving up a very young girl to her husband the courts would, however, probably require him to show that she would be placed by him under the care of some female member of his family. After the husband's death the guardianship of his infant widow, and the management of her property, devolves upon his heirs generally, or those who are entitled to inherit his estate after her death<sup>2</sup> in preference even to her own father.<sup>3</sup> It has been held by the Bombay High Court<sup>4</sup> that the deceased husband's widowed mother is, according to Hindu law, the natural guardian of an infant widow in the absence of any person claiming a preferential title to succeed to the estate of the husband.

On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them her maternal kindred.<sup>5</sup>

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<sup>1</sup> *Kateeram Dokanee v. Mussamut Gendhenee*, 23 W. R. C. R. 178.

<sup>2</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104, and Vol. II, chap. vii, cases 1 and 3. See *Khetter Monce Dossee v. Kishen Mohun Mitter*, 2 Hay 196; S. C. Marshall 313.

<sup>3</sup> Macnaghten's Hindu Law, edn. 1829, Vol. II, chap. vii, case 3, p. 204.

<sup>4</sup> *Baihesar v. Bai Ganga*, 8 Bom. H. C. Rep. A. C. J. 31.

<sup>5</sup> Macnaghten's Hindu Law, edn. 1829, Vol. I, chap. vii, p. 104.

Where the husband is himself a minor, the guardianship of his wife would be in those persons who are entitled after his death to such guardianship.

With respect to the right to give an infant in adoption, it was held by Sir Thomas Strange in one case<sup>1</sup> that the consent of both parents to the giving, as well as to the receiving, in adoption is requisite; but in his treatise on Hindu law<sup>2</sup> he states that in adopting, so in giving in adoption, though the concurrence of parents is desirable, the husband appears, by the weight of authority, to be independent of the wife, the father of the mother. And Sutherland, in his Synopsis of the Law of Adoption,<sup>3</sup> says—“On the subject of the legal ability to give a son in adoption some difficulty exist in extracting a consistent doctrine.<sup>4</sup> The more correct opinion appears to be: 1st, that the father may give away his minor son without the assent of the mother,<sup>5</sup> though it is more laudable that he should consult her wishes; 2nd, that the mother generally is incapable of such gift while the father lives; <sup>6</sup> 3rd,

Right to  
give in  
adoption.

<sup>1</sup> 1 Strange's Notes of Cases, 109.

<sup>2</sup> Edition 1830, Vol. I, p. 81.

<sup>3</sup> Edition 1821, p. 215.

<sup>4</sup> See p. 224, note ix.

<sup>5</sup> See Dattaka Mimansa, sec. iv, art. 13. The fact of the father being a leper does not disqualify him from giving his son in adoption. *Anund Mohun Mozoomdar v. Gobind Chunder Mozoomdar*, W. R. 1864 C. R. 175.

<sup>6</sup> See Dattaka Chandrika, sec. i, § 7. Colebrooke's Digest, edn. 1801, Vol. III, chap. iv, sec. viii, § 273 and notes.

that she, however, on her husband's death, may give in adoption her minor son, and even during the life of that person in case of urgent distress and necessity."

Right of  
father.

This first proposition of Sutherland's is supported by a good deal of authority,<sup>1</sup> including amongst others Sir Thomas Strange, though that author in deciding *Pillay v. Pillay*<sup>2</sup> held, that a father cannot give his son in adoption without the consent of the mother.<sup>3</sup> Indeed in his work on Hindu law composed twenty years later, Sir Thomas Strange says of this very case, in which he held that the consent of both parents is requisite, that it was discussed on comparatively imperfect materials, that the public was not then possessed of the extensive information contained in Mr. Colebrooke's Translation of the Law of Inheritance and the treatise on adoption since translated by Mr. Sutherland,—to say nothing of the manuscript materials that came subsequently into his own hands, and which had contributed largely to every chapter of his own work.<sup>4</sup> There seems, however, to be no doubt as to the correctness of Sutherland's second proposition,—namely, that the mother gene-

Right of  
mother in  
lifetime of  
father.

<sup>1</sup> Sutherland's Synopsis of the Law of Adoption, edn. 1821, p. 224, note ix. See Dattaka Mimamsa, sec. iv, art. 13.

<sup>2</sup> 1 Strange's Notes of Cases, p. 109.

<sup>3</sup> See Colebrooke's Digest, edn. 1801, Vol. III, chap. iv, sec. viii, § 273 and notes.

<sup>4</sup> Strange's Hindu Law, edn. 1830, Vol. I, p. 102.



rally is incapable of giving a child in adoption while the father lives.

With regard to Sutherland's third proposition there is some conflict of authority. Jagannatha says:<sup>1</sup> "If both his father and mother give him to another person for adoption, he truly becomes a son given: this supposes both his mother and father to be living; but if either of them be dead, the boy may be given by the survivor: however, should the man be deceased, the child must not be given by the woman without the assent of her husband declared before his death, as ordained by a special text." However, as Sir Thomas Strange points out<sup>2</sup> Jagannatha omits to give us this special text, or to say where it is to be found. In another part of his work<sup>3</sup> Jagannatha says—"Chandeswara explains the phrase *both parents have power to give a son*, the father has that power, and the mother has that power, for it is a rule that in the apposition called *dwandwa*, each term, whether expressed first or last, is severally taken and intended. The lawgiver also forbids the attempt of a mother to make a gift without the consent of the father: 'Nor let a woman give or accept a son unless with the assent of her lord;' but there is

Right of  
mother on  
death of  
father.

<sup>1</sup> Colebrooke's Digest, edn. 1801, Vol. III, chap. iv, sec. viii, § 273.

<sup>2</sup> 1 Strange's Notes of Cases, 111.

<sup>3</sup> Colebrooke's Digest, edn. 1801, Vol. III, p. 257.

this difference, if the father be living, a mother can only make a gift with his assent ; but if he be not living, she may do even without his previous consent." Jagannatha observing upon this says : "According to this opinion the husband's gift of a son is valid without his wife's consent, even during her lifetime; but the wife's property in her son is not thereby divested."

When the husband is alive, the wife cannot give a son in adoption, unless in case of urgent distress and necessity. This distress has not, as has been sometimes supposed,<sup>1</sup> any reference to the adopter's want of a son;<sup>2</sup> but it relates to the distress of the natural family of the child to be adopted. It is not necessary that that distress should proceed from any public calamity, such as actual famine, provided it be sufficiently urgent; and though there should be no distress to justify the gift, it will be good notwithstanding, not being vitiated by the breach of a prohibition which regards the giver only, not affecting the thing done.<sup>3</sup>

As we have seen, a widow can give her minor son in adoption, but she cannot give her only son,<sup>4</sup>

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<sup>1</sup> See Dattaka Mimansa, sec. i, § 7; and sec. iv, § 21. See also Dattaka Chandrika, sec. i, § 13. Mitakshara on Inheritance, chap. i, sec. xi, 10 and note.

<sup>2</sup> Strange's Hindu Law, edn. 1830, Vol. I, p. 81.

<sup>3</sup> Strange's Hindu Law, Vol. I, p. 81. Mitakshara on Inheritance, chap. i, sec. xi, 10 and note.

<sup>4</sup> *Debee Dial v. Hur Hur Sing*, 29 Dec. 1828, 4 Sel. Rep. 320.

and even where she has other sons she ought to obtain the consent of her husband's relations before giving a son in adoption.<sup>1</sup>

The Dattaka Chandrika, which is of high authority in Bengal, allows a widow to give her son in adoption where her husband has not expressly forbidden her to do so, and it implies the husband's assent from his silence.<sup>2</sup>

Under the Hindu law, a man who has permanently emigrated, entered a religious order, or become an outcast, being civilly dead, is regarded as deceased,<sup>3</sup> and his wife has the same powers as to giving in adoption as his widow would have. Now, however, under Act XXI of 1850, change of religion or loss of caste does not deprive a man of his right to give his child in adoption.

There is no doubt that, during the lifetime of the husband, the wife may, with his consent, give away a son in adoption.<sup>4</sup>

The consent of the person competent to give away a child in adoption may be presumed where the adoption has been acquiesced in for a long time.<sup>5</sup>

<sup>1</sup> See Sutherland's Synopsis of the Law of Adoption, note vi, and edn. 1821, p. 213.

<sup>2</sup> Sec. 1, arts. 31 and 32.

<sup>3</sup> Sutherland's Synopsis, edn. 1821, p. 215.

<sup>4</sup> Dattaka Chandrika, sec. i, art. 31.

<sup>5</sup> *Anandraswaji v. Ganesh Eshwant Biki*, 7 Bom. H. C. Rep. App. xxxiii.

No one but  
father or  
mother can  
give.

No one except his father or mother can give an infant in adoption. An elder brother cannot give his younger brother,<sup>1</sup> nor can an uncle give his nephew<sup>2</sup> in adoption. In short, an orphan cannot be adopted.

Adoptive  
parents  
cannot  
give.

The adoptive parents cannot give in adoption the child whom they have themselves taken in adoption, for, as Mr. Cowell points out,<sup>3</sup> in the first place, an only son is ineligible for gift; and in the second, such gift would be inconsistent with the terms of the contract on which such parents received the child,—viz., “as a son to themselves.”

Right to  
give in  
marriage.

With respect to the right to give a female infant in marriage, the Hindu law provides rules different from those which it prescribes with respect to the custody of the person and the management of the property of infants.

Right of  
father.

If the father be alive, and not incapacitated by insanity or any other cause, disqualifying him from exercising the office of guardian to his infant children, none but he can give his daughter in marriage.<sup>4</sup>

<sup>1</sup> See Macnaghten's Considerations of Hindu Law, p. 225 et seq.; *Subba Luvammai v. Ammakutte Ammal*, 2 Mad. H. C. Rep. 129; *aliter*, *Veerapermall Pillay v. Narrain Pillay*, 1 Strange's Notes of Cases, 113.

<sup>2</sup> Strange's Manual, para. 80.

<sup>3</sup> Tagore Law Lectures for 1870, p. 303.

<sup>4</sup> See Macnaghten's Hindu Law, Vol. II, ch. vii, case 2. Edn. 1828, p. 204. *Golamee Gopee Ghose v. Juggessur Ghose*, 3 W. R. C. R. 193. *Ex parte Jankypersaud Agurwallah*, 2 Boul. 28 and 114.

In one case,<sup>1</sup> however, it was held that where the father is a coolin Brahmin, married to several wives, and only occasionally visiting the mother of the infant, the duty and right of giving the infant in marriage devolved upon the mother. In that case the infant had actually been contracted in marriage by the mother in the absence of the father. Where the mother had not given the daughter in marriage, a contract even by such a father would not be invalidated by a subsequent contract entered into by the mother.

The Hindu law and religion equally require the parents and guardians of female infants to provide husbands for them before they attain the age of majority; and, therefore, where the father or other person entitled to give the infant in marriage is absent at the time when she ought so to be given, or if he neglects or refuses to obtain a husband for her at the proper time, the person next entitled to give the infant in marriage would be justified in entering into a marriage contract on her behalf.<sup>2</sup>

A father can delegate to another his authority to give his daughter in marriage, and such delegation was presumed in a case,<sup>3</sup> where the father had

<sup>1</sup> *Modhoosoodun Mookerjee v. Jadubchunder Banerjee*, 3 W. R. C. R. 194.

<sup>2</sup> See *The King v. C. Kistnama Naik*, 2 Strange's Notes of Cases, 89. *Ball Gunga v. Dhurmloss Nurseedass*, Bom. S. D. A. Rep., 27th July, 1841.

<sup>3</sup> *Golamee Gopee Ghose v. Juggessur Ghose*, 3 W. R. C. R. 193.

made over the care and custody of his daughter when two years of age to another, left her with him till the proper time for her to be married had arrived, allowed the person, with whom he left her to give her in marriage, and did nothing for four years to impeach the question of the validity of the marriage.

It is not clear to what extent the wishes of a father with regard to the marriage of his daughter can be carried out by the law after his death, or whether in a case where the father had contracted and made all the arrangements for his daughter's marriage, but died before its completion, the person with whom the contract for marriage had been made could enforce its performance.<sup>1</sup>

Devolution  
of right in  
default of  
father.

After the death of the father, or in case of his having permanently emigrated or having become a recluse, the right and duty of selecting a husband for a female infant devolves, in the first place, upon her paternal male relations,<sup>2</sup> namely, on her paternal grandfather; then on her brother; and in default of brothers on her paternal relations as far as the tenth degree of affinity in order of proximity; then on the mother, the maternal grandfather, the maternal uncle and the relatives in the maternal line.<sup>3</sup>

<sup>1</sup> *Juggernathpersad Agurwallah v. Janhypersad*, 2 Boul. 28.

<sup>2</sup> *Ex parte Janhypersaud Agurwallah*, 2 Boul., 114. Strange's Hindu Law, Vol. I, p. 36; and Vol. II, pp. 28 and 30. Macnaghten's Hindu Law, Vol. II, chap. vii, case ii, edn. 1828, p. 204.

<sup>3</sup> Shamachurn's Vyavastha Darpana, p. 651.

Failing these the paternal relatives beyond the tenth degree would presumably be entitled to give the infant in marriage.

Although it is the universal tendency of the Hindu law to exhibit the Hindu woman as occupying a strict state of pupillage,<sup>1</sup> and, therefore, incapable of exercising rights of guardianship, the mother should be consulted with reference to the disposal of her infant children in marriage, and indeed in some cases a betrothal by her would be held good. Right of mother.

The rights of the mother with respect to the marriage of her infant child were most fully considered in the judgment of the Madras High Court, in the case of *S. Namasevayan Pillay v. Annammai Ammal*,<sup>2</sup> which contains principles equally applicable to Bengal.

In that case the divided brother of the defendant's deceased husband sued to obtain a declaration of his independent legal rights to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant ; and also to obtain a declaration of her obligation to accept any persons whom he might select, and to provide for the celebration of their marriages. In giving judgment

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<sup>1</sup> *Ex parte Jankypersaud Agurwallah*, 2 Boul. 116.

<sup>2</sup> 4 Mad. H. C. Rep. 339.

the court said: "The authorities relied upon in argument as directly supporting the alleged right rest on a text of Yajnavalkya, which, as given in the remark of Mr. Colebrooke, to be found in Strange's Hindu Law, Vol II, p. 28, is: 'The father, paternal grandfather, brother, kinsman, remote relations (saculya) and mother, are the persons to give away a damsel—the latter respectively on failure of the preceding.' The version given in the Digest, Bk. v, chap. iii, sec. cxxxv, is: 'In the disposal of a girl, the father, the paternal grandfather, the brother, a kinsman, or the natural mother shall be consulted in the order here specified; upon the death of the first the right of giving away the damsel devolves on each of the others successively, provided they be of sound understanding.' It cannot be gainsaid that this text, in its literal acceptance, does import an individual right of betrothal in the order of succession declared, and we do not see any sufficient ground on which it can be held to be applicable only to the daughters of an undivided member. In the Digest and in Vol. I, p. 36, of Sir Thomas Strange's Hindu Law, it is treated as of general application. But it does not necessarily import the absolute exclusive right which the plaintiff seeks to have declared, namely, the right to betroth his brother's daughters to any person whom he may hereafter choose without reference to their mother, and even against her feelings and wishes.



Therefore, in forming our judgment as to its true effect and force, we must be governed by a consideration of the reason and principle on which it rests, and the natural rights of the defendant as a mother and her legal position and capacities as a widow.

“In principle and reason the duty enjoined in the male relatives of the father is not, it appears to us, founded upon the incapacity of a woman to perform the rites required by the Hindu system of rules relating to the marriage ceremony. Among the rites at the marriages of Brahmins as set forth in Mr. Colebrooke’s third essay on the religious ceremonies of the Hindus (see first volume of his *Miscellaneous Essays*, p. 203), there are some to be performed by the bride’s father, which (as was urged for the appellant) the mother could not in person perform instead of the father, and perhaps the same may be said of the rites practised at the marriages of members of some of the other castes and sects. But we have no doubt that the mother would be quite as competent to depute a male kinsman of her husband to act for her on such an occasion as on the occasion of the performance of her husband’s exequial ceremonies. This, too, the very ordinance itself recognizes by placing the mother in the order of persons who are charged with the duty of betrothal enjoined by it. The true reason for the injunction, it appears to us, was the state of dependence in which women were formerly placed by the law, even where

as widows they had succeeded to the possession of their husbands' estates, and that certainly does not warrant the ordinance being carried to the length of declaring the right claimed by the plaintiff, if what appears to us to be the reasonable and proper view of the law relating to such state of dependence be taken."

After giving the authorities for the dependence of women, the court went on to say: "Protection and guidance and submission thereto are the duties thus enjoined, and seeing that women of full age are, throughout the law, treated as of legal capacity to act to a limited extent, it is a reasonable implication that those relative duties were intended to be performed by their appointed protectors with a due regard to the feelings and wishes of those under protection, whether wives or widows, within the sphere of their proper duties and the legitimate limits of their proprietary rights. In short, the state in which it appears to us women were intended to be placed was simply that of protective guardianship, very similar probably to the *legitima tutela muliebris* exercised under the Roman law before the time of Justinian over women of full age and *sui juris* which, recognizing their legal capacity to act, required the advice and intervention of their tutors to give effect to their transactions. See Colquhoun's Roman Civil Law, Vol. I, sections 741, 742. In this view it would obviously be doing violence

to the reason and principle on which the text of Yajnavalkya is based to put the construction upon it necessary to support the plaintiff's present claim, for it is beyond question that a voice in the betrothal of a child of tender years is peculiarly a mother's right and duty. The dictates of human natural affection impel her to feel deep concern in such an event, and teach that her feelings and wishes should be fully consulted, and the whole spirit and policy of the Hindu law seems to us to accord to every mother the perfect enjoyment of this natural right. But the strictly legal position and rights of the defendant as the guardian of her daughters and the possessor of her husband's property present still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognized a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his kinsmen. Such a recognition is very inconsistent with the disposal of her daughters in marriage by the husband's brother or other relation without reference to her, and tends forcibly to support the view we have expressed with regard to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law *ever* having given the exclusive right contended for. But now that the texts declaring such state of dependency have become, as did the Roman law relating

to the *tutela muliebris* obsolete, and a woman acts independently as guardian, and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that although competent and capable to be guardian, a mother has no right to be consulted in the choice of a husband for her daughter. Again, as the possessor of a life-estate by right of legal succession in all her husband's property, the defendant is, as has been well settled, absolutely *sui juris* (*Kanavadhani Venkata Subbaiya v. Joyasa Narasin Gappa*, 3 Mad. H. C. Rep. 116), and is the person on whom the law casts the duty of determining what is a proper provision for her daughters' marriages, and providing the means required to defray the expenses of their celebration.

"The independent right and discretion which she is competent to exercise in that respect she cannot be called upon to exercise until the choice of a bridegroom has been made, and her reasonable discretion in the matter must be guided to some extent by the choice made. It seems to us to be necessarily incident to this absolute capacity to act that, in making the choice of a bridegroom, the defendant should be consulted."

The court further said: "If on a choice being made of a person in every way suitable to be affianced, and the mother without sufficient cause improperly refused to accept him, and obstructed the betrothal, a suit to compel her to allow the ceremony

to take place, and, if she was chargeable, to provide means for its celebration, would probably be successful. But no court, we think, would be justified in granting such relief if the mother's refusal and resistance was because of serious objections to the person chosen, or for other good and sufficient cause: nor, we think, would the betrothal of a daughter with an unobjectionable person of the mother's selection be restrained at the suit of the brother or other kinsmen of the father who had been consulted by the mother, and had, without any sufficient cause, objected to the betrothal."

There is no doubt that, in spite of their being themselves considered in a state of pupillage, the female kindred of a minor may so dispose of her with the consent of her male kindred or those entitled to the right. It was held in the case of *Maharanee Ram Bunsee Koonwaree v. Maharanee Soobh Koonwaree*,<sup>1</sup> that a paternal grandmother, with the assent of the nearest male kindred on the father's side, has, in preference to the stepmother, the right to dispose of a minor in marriage.

Right of  
female re-  
lations.

Paternal  
grand-  
mother.

I shall in a future lecture consider the effect under the Hindu law of a marriage which has been entered into by minors, or on their behalf without the requisite consent of the persons entitled to give them in marriage.<sup>2</sup>

<sup>1</sup> 7 W. R. C. R. 321.

<sup>2</sup> See *Modhooosudan Mookherjee v. Jadub Chunder Banerjee*, 3 W. R. C. R. 194.

Effect of  
loss of caste  
on right of  
guardian-  
ship.

Act XXI of  
1850.

Under the Hindu law loss of caste involved a loss of the right of guardianship of the person and property of minors;<sup>1</sup> but since the passing of Act XXI of 1850 such right of guardianship ceased to be affected by a change of religion or loss of caste.<sup>2</sup> Where, however, the appointment of a guardian is in the discretion of the court, a person out of caste would rarely, except in the absence of other near relatives of the minor, be appointed his guardian.

There is nothing, however, to prevent a testator in appointing guardians of his children by will from providing that the persons whom he appoints shall be disqualified or excluded from office on changing their religion; but where a will provides that a guardian shall become disqualified by changing his religion, such a provision would not include a change to another form of the Hindu religion, as by becoming a Vedantist.<sup>3</sup>

Certain religious ceremonies, however, which it is the duty of the guardian of a Hindu infant to perform on behalf of his ward, cannot be performed by a guardian who is an outcast, or who has changed his religion. In that case they must be

<sup>1</sup> See *Fuggao Daye v. Rawal Daye*, 4 W. R. M. A. 3.

<sup>2</sup> *Muchoo v. Arzoon Sahoo*, 5 W. R. C. R. 235. See *post*, Lecture V, as to the effect of a change of religion by the parent or other guardian of a minor.

<sup>3</sup> See *Anund Coomur Gangooly v. Rakkhal Chunder Roy*, 8 W. R. C. R. 278.

performed by the person next entitled to the guardianship of the infant, and it is the duty of the guardian out of the estate of the infant to make over to such person the requisite funds to pay the expenses of those ceremonies.

Under the Mahomedan law the right to the guardianship of infants is viewed differently in reference to (1) the custody and care of their persons, (2) the management of their property, and (3) the disposal of them in marriage.

The natural guardians of minors are, according to the Mahomedan law, either *near* or *remote*. Fathers, their executors, paternal grandfathers, their executors, and the executors of such executors, constitute the *near guardians*. All other guardians are *remote guardians*.<sup>1</sup>

The former description of guardians answer to the term of curator in the civil law, and of manager or surbarakar in the Bengal Code of Regulations;<sup>2</sup> and they alone are entitled to the management of the property of a Mahomedan minor. We shall discuss in a future lecture the powers of such guardians over the property of their wards.

Failing them the custody and care of the infant's property does not devolve upon the remote

<sup>1</sup> Macnaghten's Principles of Mahomedan Law, chap. viii, 4th edn., p. 62.

<sup>2</sup> Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 6 4th edn., p. 63.

guardians, who under no circumstances are entitled to the management of such property, but it devolves upon the ruling authority,<sup>1</sup> or its representative the judge, whose duty it is to appoint a guardian of the infant's property.<sup>2</sup>

Testamentary appointment of guardian.

In Mahomedan law, as in Hindu law,<sup>3</sup> the father has power<sup>4</sup> to appoint by will a guardian of the person and the property of his infant children. There is, however, apparently a difference in this respect between the Hindu and Mahomedan law, namely, that while the Hindu law requires the person to be specifically appointed guardian by the will, the Mahomedan law gives to the executor of the father's will the right of managing the infant's property, whether or not he may have been appointed guardian by the will; and the Mahomedan law further extends this privilege, as we have seen, to the executors of the grandfather and to their executors.

The Mahomedan law does not, however, permit

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<sup>1</sup> *Mussamut Bukshan v. Mussamut Maldai Kooeri*, 3 B. L. R. 423; S. C. 12 W. R. C. R. 337. *Rutton v. Dhoomee Khan*, 3 Agra H. C. Rep. 21. Macnaghten's Principles of Mahomedan Law, chap. viii, para. 6. Baillie's Digest of Mahomedan Law, p. 319.

<sup>2</sup> See Tagore Law Lectures for 1873, by Shama Churn Sircar, p. 478. Macnaghten's Precedents of Mahomedan Law, chap. vii, prec. 1.

<sup>3</sup> See *ante*, p. 38.

<sup>4</sup> Macnaghten's Principles of Mahomedan Law, chap. viii, prin. 4. *Sheikh Alimodeed Moallem v. Mussamut Syfoora Bibee*, 6 W. R. M. R. 125.



the father by will to interfere with the right of custody of his male children until they attain the age of seven years, and of his female children until they attain puberty, which right, as we shall see hereafter, is possessed by the mother and other female relations of the infant. The legislature of this country has recognised the power of Mahomedans as well as of Hindus<sup>1</sup> to make wills and to appoint guardians for their children by such wills, and Regulation V of 1799 and Act XL of 1858 apply to Mahomedans as well as to Hindus.

The latter Act, in fact, applies, outside Calcutta, to all except European British subjects.

There seems to be no limitation as to the persons who may be appointed guardian by the father; a mother is equally eligible with others to be nominated guardian.<sup>2</sup>

With regard to the custody (*hizanut*) of the *Hizanut.* persons of infant children, the Mahomedan law provides a principle very different from that which prevails according to Hindu law. The Hindu law gives the preference to the father; but the Mahomedan law postpones the rights of the father, and provides that the mother, in preference to the father and all others, is entitled to the custody of her infant male

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<sup>1</sup> See page 38, *ante*.

<sup>2</sup> Macnaghten's Mahomedan Law, Precedents, chap. vii, case 4, pages 307 and 308; and Appendix, p. 443. East's Notes, case 1.

children until they attain the age of seven years,<sup>1</sup> and of her female children until they attain the age of puberty.<sup>2</sup>

Right of  
mother.

Under the Mahomedan law the mother, if of good character, retains this right during marriage and after separation from her husband,<sup>3</sup> even though she may have been divorced from him.<sup>4</sup>

After becoming a widow the mother retains the right of *hizanut*, except in case of her remarriage with a stranger, in which case that right would, however, revert on her again becoming a widow.

The Mahomedan law excludes the mother from the guardianship of her infant children if she be an apostate, or have adopted a course of living likely to be injurious to her child, as adultery, theft, or the being a professional singer, or mourner. Also a mother who is continually going out and leaving her child, is, under the Mahomedan law, not worthy to be trusted with the custody of her children.<sup>5</sup> However, since the passing of Act XXI

<sup>1</sup> *Ameeroonissa and others*, 11 W. R. C. R. 297; *In the matter of Tayheb*, 2 Hyde 63; *Sheikh Alimodeed Moallem v. Musst. Syfoora Bibee*, 6 W. R. M. R. 125; *Shahzada Futieh Ali Shah v. Shahzada Mahomed Mookeemooddeen*, W. R. 1864 C. R. 131. See Hedaya, Vol. I, Bk. iv, chap. 14.

<sup>2</sup> Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 8; Precedents, chap. vi, case 18, p. 268. *In the matter of Khatija Bibee*, 5 B. L. R. 557.

<sup>3</sup> Tagore Law Lectures for 1873, p. 485. Hedaya, Vol. I, Bk. iv, chap. 14.

<sup>4</sup> Macnaghten's Mahomedan Law, App. Title "Infant," 8, p. 446.

<sup>5</sup> Baillie's Digest, pp. 431 and 432.

of 1850, apostacy does not disqualify even a Mahomedan mother from retaining the guardianship of her children.<sup>1</sup> After the mother, the mother's mother how high soever (that is to say, the maternal grandmother, great grandmother, and so forth), and failing her, the father's mother how high soever,<sup>2</sup> is entitled to the custody of a Mahomedan infant.

Grand-mother.

Failing the mother and grandmothers, the right of *hizanut* of a Mahomedan infant devolves upon its sisters,—namely, first on the full sister, then on the uterine half sister, and then on the half sister by the father's side. Then follow the daughters of the sisters in the order in which their mothers were entitled. According to one tradition the maternal aunt is preferable to a half sister by the father's side; but this tradition has not apparently been supported by practice.

Daughters of sisters.

After the sisters and their daughters come the maternal aunts, and failing them the paternal aunts.<sup>3</sup> The same distinction also prevails among the aunts as among the sisters,—that is, she who is doubly related has a preference to her who is singly related; thus the maternal aunt, who is full

Aunts.

<sup>1</sup> See *Fuggao Daye v. Rawal Daye*, 4 W. R. M. A. 3. See, however, *In the matter of Mahin Bibee*, 13 B. L. R. 160.

<sup>2</sup> See note at p. 486 of Tagore Law Lectures, 1873. Hedaya, Vol. I, Bk. iv, chap. 14; and Baillie's Digest, pp. 431, 432.

<sup>3</sup> Tagore Law Lectures, 1873, p. 486. Baillie's Digest, pp. 431 and 432.

sister to the mother, precedes a half sister of the mother, maternal or paternal; and in the same manner, a maternal sister of the mother precedes a paternal sister; and so also of the paternal aunts.<sup>1</sup>

Period of  
hizanut.

All these persons are entitled to the custody of the infant for the same period as the mother is so entitled,—namely, if the infant be a male, until it attains the age of seven years; and if it be a female, until it has arrived at puberty.

Reasons for  
the law.

Thus, in contradistinction to the Hindu law, the Mahomedan law prefers to give the custody of infants to their female maternal relations instead of, as is the case in Hindu law, their male paternal relations. The Hedaya<sup>2</sup> explains this preference as follows: “The right of *hizanut* with respect to a male child appertains to the mother, grandmother, or so forth, until he becomes independent of it himself,—that is to say, becomes capable of shifting, eating, drinking, and performing the other natural functions without assistance; after which the charge devolves upon the father or next paternal relation entitled to the office of guardian, because when thus advanced, it then becomes necessary to attend to his education in all branches of useful and ornamental science, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified.

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<sup>1</sup> Hedaya, Vol. I, Bk. iv, chap. 14.    <sup>2</sup> Vol. I, Bk. iv, chap. 14.

(Kasaf says, that the *hizanut* with respect to a boy ceases at the end of seven years, as in general a child of that age is capable of performing all the necessary offices for himself without assistance.) But the right of *hizanut* with respect to a girl appertains to the mother, grandmother, and so forth, until the first appearance of the menstrual discharge (that is to say, until she attain the age of puberty), because a girl has occasion to learn such manners and accomplishments as are proper to women, to the teaching of which the female relations are most competent; but after that period the charge of her property belongs to the father, because a girl, after maturity, requires some person to superintend her conduct, and to this the father is most completely qualified."

The rights of the mother, and of the females whom I have enumerated as succeeding her in the custody of her infant children, cease on their marrying strangers,—i. e., persons outside the prohibited degrees of relationship; but reverts again on their becoming widows, or on their marriage being dissolved.<sup>1</sup>

Where a mother or other person entitled to the custody of an infant neglects to support it, her right

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<sup>1</sup> *Beedhun Bibee v. Fuzoolah*, 20 W. R. C. R. 411. Baillie's Digest, 432. Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 9. Hedaya, Vol. I, Bk. iv, chap. 14.

to its custody ceases,<sup>1</sup> and devolves upon the person next entitled to such right.

Sheeas.

There is a question whether these rules with respect to the custody of Mahomedan infants apply in their entirety to persons governed by the Sheea law. It was held<sup>2</sup> by a Division Bench of the High Court, acting on a futwa of the Mahomedan law officer of the Presidency, the Cazeer-ool-cozaat, that, under the Sheea law, a mother is entitled to the custody of her female child up to its seventh year only. And Mr. Baillie, in his Digest of the Imaamea law, which governs the Sheea sect, states,<sup>3</sup> that a mother can neither be herself the guardian of her children, nor can she make a testamentary appointment of guardians to them. Mr. Baillie's latter proposition is equally true with respect to Sunnis; but the former proposition,—namely, that a mother cannot herself be guardian of her children,—seems to refer to the management of their property, and not to the custody of their persons.

Right of custody after expiration of period of *hizanut*.

As we have seen, under the Mahomedan law, a female's right of custody of the person of an infant exists only during the period of *hizanut*, which, if the infant be a boy, terminates when he is seven

<sup>1</sup> See *Ameeroonissa and others*, 11 W. R. C. R. 297. Tagore Law Lectures, 1873, p. 486. See Hedaya, Vol. IV, Bk. xlv, sec. 7, p. 124.

<sup>2</sup> *Mussamut Raj Begum v. Nawab Reza Hossein*, 2 W. R. C. R. 76.

<sup>3</sup> Page 232.

years of age, and if a girl, at any rate under the Sunni law, on her attaining puberty. After the termination of the period of *hizanut*, or during that period, if there be no female relation of the infant capable of being entrusted with its custody, the right of custody devolves upon the agnate male relations (*asabah*)<sup>1</sup> for the purpose of the education and marriage of the infant, and this right is determined in proportion to the proximity of the claims of the relatives to inherit the estate of the minor.

Under the Mahomedan law the infant, even after passing the period of *hizanut*, has no power to exercise any option as to the custody in which it is to remain. Infant has no option as to custody.

Of these relations the father is the first entitled, then the paternal grandfather and the paternal great grandfather, and so forth;<sup>2</sup> then the full brother, then the half brother by the father, then the son of the full brother, then the son of the half brother by the father, then the full paternal uncle, then the half paternal uncle on the father's side, and then the sons of paternal uncles in the same order. A girl, however, should not be entrusted to the care of any male person unless he be within the prohibited degrees of relationship, which includes all the male persons enumerated above as entitled to the cus- Custody of boy. Custody of girl.

<sup>1</sup> Tagore Law Lectures, 1873, p. 488. Macnaghten's Mahomedan Law, chap. viii, princ. 10. Baillie's Digest, 434.

<sup>2</sup> Hedaya, Vol. I, Bk. iv, chap. 14, p. 389.

Period of  
custody.

tody of a boy, with the exception of the sons of the paternal uncles, to whom the custody of females may not be entrusted.<sup>1</sup> The custody by male relations of a boy continues until puberty, or rather the attainment of the age of majority; while that of a girl continues not only till puberty, but till she can safely be left to herself, and trusted to take care of herself. If she is adult and a virgin, her guardians have a right to retain her, though there should be no apprehension of her doing anything wrong while she is of tender age. But if more advanced in years, and of ripe discretion and chaste, they have no right to retain her, and she may reside wherever she pleases.<sup>2</sup> The profligacy of a male relation (asabah) disqualifies him from the right of custody of a female minor; and in the default of her possessing male relatives within the prohibited degrees free from such vice as would be injurious to her, it becomes, according to the Mahomedan law, the duty of the kazi or judge to take cognizance of the infant's unprotected condition, and to appoint a guardian for her.<sup>3</sup>

Right of  
giving in  
marriage.

The duty and right of giving in marriage a male or female infant falls upon a different line of guardians than either those who are entrusted with the management of the infant's property, or those who

<sup>1</sup> Tagore Law Lectures, 1873, pp. 307 and 488. Baillie's Digest, 433.

<sup>2</sup> Baillie's Digest, pp. 434 and 435.

<sup>3</sup> Baillie's Digest, p. 434.



are entitled to the custody of its person. The father is first entitled to give his child in marriage, and after him the paternal grandfather, how high soever, is so entitled. A contract of marriage entered into by a father or grandfather on behalf of an infant is valid and binding, and the infant has not the option of annulling it on attaining majority<sup>1</sup> as he has in the case of a contract of marriage entered into for him by any other guardian.

The executor of the father or grandfather has no power to contract an infant in marriage even though he be appointed for that purpose by the testator.<sup>2</sup> The executor may, of course, contract the infant in marriage when he happens to be the natural guardian; then he has the power, by virtue of his guardianship, not of his executorship. In default of the father and grandfather the next entitled to give a Mahomedan infant in marriage are the other agnate relatives in the order in which they would be entitled to inherit the estate of the infant. After the grandfather comes the full brother; then the half brother by the father's side; then the son of the full brother; then the son of the half brother by the father's side, how low soever; then the full uncle; then the half uncle by the father's side; then the son of the full uncle; then the son of the half

Paternal  
grand-  
father.

Devolution  
of right  
in default  
of father  
and grand-  
father.

<sup>1</sup> Macnaghten's Mahomedan Law, chap. vii, princ. 18.

<sup>2</sup> Baillie's Digest, p. 47.

uncle by the fathers' side and their descendants; then the father's full paternal uncle; then his paternal half uncle by the father's side; then the sons of both in the same order; then the grandfather's full paternal uncle; then his paternal half uncle by the father's side, and then the sons of both in the same order; then the sons of a more distant paternal uncle.<sup>1</sup> After these the mother follows; and failing her the near uterine relatives, who might inherit from the minor, attain the right in order of proximity.<sup>2</sup> These are the full sisters, then the half sister by the father's side, then the half brother and sister by the mother, and then their children. Then come paternal aunts, maternal uncles, then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts; and the false or maternal grandfather is preferred to the sister, according to Aboo Haneefa.<sup>3</sup>

After these people the right of providing for the marriage of an infant devolves, according to Mahomedan law, upon the *mowla-ool-mowalat*, or successor by contract;<sup>4</sup> then on the ruling authority,<sup>5</sup> or its representative the *kazi*. If there be no *kazi*

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<sup>1</sup> Baillie's Digest, pp. 45 and 46.

<sup>2</sup> Tagore Law Lectures, 1873, pp. 329 and 331. Baillie's Digest, p. 46.

<sup>3</sup> Baillie's Digest, p. 46.

<sup>4</sup> As to what constitutes a *mowla-ool-mowalat*, see Tagore Law Lectures, 1873, pp. 91 and 92.

<sup>5</sup> Baillie's Digest, pp. 46, 47.

present, then the minor, if of sound discretion, may himself or herself contract the marriage, which, however, may be repudiated by him or her on attaining majority, *i. e.*, puberty.<sup>1</sup>

The consent of the nearest guardian in the above scale is essential to the validity of the marriage of an infant, but if the nearest guardian be incapacitated by reason of minority, insanity, profligacy or absence at such a distance as to preclude him from acting, the next guardian becomes entitled to enter into the marriage contract.<sup>2</sup>

Any circumstances which prevent a guardian from providing for his ward a suitable marriage at the proper age, would be sufficient to cause the right to devolve upon the guardian next in the scale. For instance, where the guardian is in jail, and not likely to be released for a long period.<sup>3</sup> It is not easy to say as to how far a guardian must be distant in order to give validity to a marriage contract effected by a more remote guardian. In the *Hedaya*<sup>4</sup> we find this: "If the parents or other first natural guardians of an infant should be removed to such a distance as is termed *gheebat moonkatat*, it is in that case lawful for the guardian next in

Circumstances causing devolution of right.

Absence of guardian.

<sup>1</sup> See Macnaghten's Mahomedan Law, Precedents, chap. vi, case 16, p. 265.

<sup>2</sup> Baillie's Digest, p. 49.

<sup>3</sup> *Sheikh Kaloo v. Gureeboollah Sheikh*, 10 W. R. C. R. 12; S. C. 13 B. L. R. note to p. 163.

<sup>4</sup> Vol. I, Bk. ii, chap. iii, p. 108.

degree to contract the infant in marriage." And again we find:<sup>1</sup> "By the absence termed *gheebat moonkatat* is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once in every year; some, however, have defined it to signify any distance amounting to three days' journey." In Macnaghten's Precedents of Mahomedan Law,<sup>2</sup> a case is mentioned, where it was held that a distance of three days' journey is sufficient to justify the next guardian in contracting the infant in marriage. A day's journey or stage is explained by Rusail-ool-Arkan to mean as far as a person may be able to travel, at a moderate pace, in the shortest day of the year, between morning and the setting of the sun.<sup>3</sup>

This arbitrary rule would not, probably, be now recognised by the courts of law, and whenever the legal guardian is within a reasonable distance from the place of residence of the minor, his consent to the marriage contract would be deemed to be necessary.

Under the Mahomedan law, a husband has not such an absolute right to the custody of his minor wife as is accorded to Hindu husbands by the Hindu law.

Right of  
husband to  
custody of  
infant wife.

<sup>1</sup> Page 109.

<sup>2</sup> Chap. vi, case 14, p. 263.

<sup>3</sup> Macnaghten's Precedents of Mahomedan Law, chap. v, case 9, p. 207.

Even after the marriage, the mother, or other guardian who succeeds the mother in the right of *hizanut* of the infant, is entitled to retain the infant wife until she has attained puberty and is fit to bear the embraces of a husband.<sup>1</sup> After that period has arrived he is entitled to have her made over to him, provided that he has paid her dower; and even before she has attained puberty the law does not consider the custody of her by her husband an unlawful custody,<sup>2</sup> and, where the husband has once lawfully obtained possession of his wife, he cannot be compelled, by any summary process, to give her up. On the other hand, the husband is not obliged to maintain his wife when she is too young for matrimonial intercourse;<sup>3</sup> and his right to the custody of his wife is, in every case, dependent upon her being maintained by him.

Under the Mahomedan law minority, insanity, profligacy, and apostacy were grounds of disqualification for the office of guardian to an infant, but now apostacy would not involve a loss of the right of guardianship for all purposes. In a case<sup>4</sup>

Grounds of  
disqualifi-  
cation for  
guardian-  
ship.

<sup>1</sup> See *In the matter of Khatija Bibi*, 5 B. L. R. 557. *In the matter of Mahin Bibi*, 13 B. L. R. 160. Baillie's Digest, pp. 54, 125, and 126. Macnaghten's Mahomedan Law, Precedents, chap. vi, case 16, p. 265.

<sup>2</sup> *In the matter of Mahin Bibi*, 13 B. L. R. 160.

<sup>3</sup> *In the matter of Khatija Bibi*, 5 B. L. R. 557. Baillie's Digest, p. 437. Hedaya, Bk. iv, chap. xv, p. 394. See *Kolushun Bibi v. Sheikh Dedar Buksh*, 24 W. R. Crim. R. 44.

<sup>4</sup> *In the matter of Mahin Bibi*, 13 B. L. R. 160.

decided as late as 1874, Mr. Justice Macpherson considered that a father who had become an apostate from the Mahomedan faith, thereby lost his right to give his daughter in marriage; but the attention of the learned Judge does not seem to have been called to the case of *Muchoo v. Arzoon Sahoo*,<sup>1</sup> in which it was held that the right of guardianship is a right within the meaning of Act XXI of 1850, and that apostacy would not involve a forfeiture of such right.

Apostacy might now deprive a Mahomedan guardian of his right to direct the education of his ward, but since the passing of Act XXI of 1850, it would not deprive him of any other portion of his rights.<sup>2</sup>

Right of  
guardian-  
ship of per-  
sons other  
than Hin-  
dus and  
Mahome-  
dans.

We now come to consider the right of guardianship of persons other than Hindus and Mahomedans.

This question is one of extreme difficulty, and where this right is a subject of litigation, it depends to some extent upon the court in which it is under discussion.

High Court

The High Court, in the exercise of its original jurisdiction, in addition to the Hindu and Mahomedan law, administers the common law and statute law of England which existed prior to the year 1726, as modified by the statutes relating to India and

<sup>1</sup> 5 W. R. C. R. 235.

<sup>2</sup> See *post*, Lecture V.

the Acts of the Governor-General in Council and of the Legislative Council of Bengal.<sup>1</sup>

The mofussil civil courts are not bound by any portion of the English law, except the statutes relating to India. Those statutes, together with the Regulations of Government and the Acts of the supreme and local legislatures, form the only express law which guides those courts in cases not governed by the Hindu and Mahomedan laws. In cases for which those Regulations and Acts make no provision, the mofussil civil courts must proceed according to justice, equity, and good conscience.<sup>2</sup> This leaves much to the discretion of the judges; but in determining the right of guardianship of persons other than Hindus and Mahomedans, they would be, to a great extent, guided by the law administered by the High Court.

The procedure of the High Court in appointing guardians to infants is, as we shall see hereafter, very different from that of the civil courts in the mofussil.

Under the law as administered by the High Court, the general rule is, that the legal power over infants other than Hindus and Mahomedans belongs to the father, and that, during his life, the mother has none.<sup>3</sup>

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<sup>1</sup> See Morley's Digest, introduction, p. 7.

<sup>2</sup> See Tagore Law Lectures for 1872, p. 225.

<sup>3</sup> See *In the matter of Holmes*, 1 Hyde 99.

The father is the legal guardian of his legitimate children, of whatever age they may be,<sup>1</sup> even though they be infants at the breast;<sup>2</sup> and except in case of gross misconduct, he cannot be deprived of his legal right to the custody of their persons.<sup>3</sup> The father is entitled to this right absolutely even against the mother,<sup>4</sup> and the father is not obliged to permit the mother to have access to the children;<sup>5</sup> but, where he has agreed to give such access to the mother, he will be compelled to allow and make proper provision for such access,<sup>6</sup> and where the father is seeking relief from the court he may be put upon terms to allow his wife from time to time to see her children.<sup>7</sup>

A mother, as such, is entitled, during the father's lifetime (at least, as against the father), to no power over her infant children, but only to reverence and respect. As a father has, even against the mother, an absolute right to the guardianship of his infant legitimate children, he has *a fortiori* such right against persons other than the

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<sup>1</sup> *In the matter of Holmes*, 1 Hyde 99; *Ex parte McClellan*, 1 Dowl. P. C. 84; *De Manneville v. De Manneville*, 10 Ves. 63; *Wellesley v. the Duke of Beaufort*, 2 Russ. 21.

<sup>2</sup> *R. v. De Manneville*, 5 East 220; *Re Thomas*, 22 L. J. Ch. 1075; *Ex parte Young*, 26 L. T. 92, 4 W. R. 129.

<sup>3</sup> *Re Halliday*, 17 Jur. 56.

<sup>4</sup> *Ex parte Glover*, 4 Dowl. P. C. 293; *Ex parte Skinner*, 9 Moore 278.

<sup>5</sup> See *Ball v. Ball*, 2 Sim. 35.

<sup>6</sup> *Ex parte Lytton*, quoted at 5 East 222.

<sup>7</sup> *In the matter of Holmes*, 1 Hyde 100.



mother.<sup>1</sup> The father is entitled either to keep his children under his own control, or to place them in the charge of other persons,<sup>2</sup> and "he may also delegate part of his parental authority during his life to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of constraint and correction, as may be necessary to answer the purposes for which he is employed."<sup>3</sup>

The power of the father over his infant children is not so much a right as a trust. Lord Redesdale, in *Wellesley v. Wellesley*,<sup>4</sup> denies that the law ever considered the power of the father to be uncontrolled by the courts, and says that that power has always been considered as a trust. He goes on to say,— "Look at all the elementary writings on the subject; they say that a father is entrusted with the care of the children, that he is entrusted with it for this reason, because it is supposed his natural affection would make him the most proper person to discharge that trust."

By English law the power of a father to appoint guardians to his children by will or deed was first

Power of  
appoint-  
ment by  
father.

<sup>1</sup> *Golding v. Castle*, 14 Jur. 1080.

<sup>2</sup> *Ex parte McClellan*, 1 Dowl. P. C. 81.

<sup>3</sup> Blackstone's Commentaries by Stephens, Vol. II, p. 30, 5th edn. *Re Sutor*, 2 Fost. and Fin. 267.

<sup>4</sup> 2 Bligh N. S. 124, at p. 141.

given by the Statute 12 Car. II, c. 24, which was applicable to Calcutta.

That Act provided<sup>1</sup> that “where any person hath or shall have any child or children under the age of one and twenty years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mere*, or whether such father be within the age of one and twenty years, or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser time, to any person or persons in possession or remainder other than Popish recusants; and that such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise, and that such person or persons to whom the custody of such child or children hath been or shall be

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<sup>1</sup> Sec. 8.

so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children for the recovery of such child or children, and shall and may recover damages for the same in the said action for the use and benefit of such child or children." The 9th section of the same statute further enacts, "that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children; and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children till their respective age of one and twenty years or any lesser time according to such disposition aforesaid; and may bring such action or actions in relation thereunto as by law a guardian in common socage might do." Act XXV of 1838, which applies to wills made between the 1st of February, 1839,<sup>1</sup> and the 1st of January, 1866, seems<sup>2</sup> to have taken away from minor fathers the power of appointing guardians to their children by will; but by the Indian Succession Act,<sup>3</sup> which applies to wills made on and since the 1st of January, 1866, a father, what-

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<sup>1</sup> Sec. 31.<sup>2</sup> Sec. 5.<sup>3</sup> Act X of 1865, sec. 47.

ever his age may be, may, by will, appoint a guardian or guardians for his children during minority. This provision was not extended to Hindus by the Hindu Wills Act.<sup>1</sup> So as the law at present stands, Hindus, Mahomedans, and Buddhists are the only persons who cannot, during minority, appoint by will guardians to their infant children.

The 331st section of the Indian Succession Act provides, that the provisions of that Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan, or Buddhist. The 47th section does not, it is true, relate to the succession to property, but inasmuch as the purpose of the Act was to amend and define the rules of law applicable to intestate and testamentary succession, and also inasmuch as although the other sections of Part VII of the Succession Act are incorporated into the Hindu Wills Act, the 47th section is excluded, the legislature evidently considered it inadvisable to extend the privileges of the 47th section to Hindus.

No one but  
father can  
appoint.

No one but the father can appoint a guardian to his children, and an appointment by the mother is absolutely void.<sup>2</sup> Neither the father nor the mother<sup>3</sup>

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<sup>1</sup> Act XXI of 1870.

<sup>2</sup> *Bedell v. Constable*, Vaugh. 180; *Ex parte Edwards*, 3 Atk. 519; *Villareal v. Mellish*, 2 Swanst. 533; *In re Kaye*, L. R. 1 Ch. 387.

<sup>3</sup> *Ward v. St. Paul*, 2 Brown's Chancery Cases, 533. See *Ex parte Glover*, 4 Dowl. P. C. 291.

have any power to appoint guardians to their illegitimate children. Illegitimate children.

The testamentary appointment of guardians by the mother will, however, be looked at by the court, and will often guide the court in disposing of the guardianship of infants.<sup>1</sup> Appointment by mother.

A father can also appoint by deed guardians to his children, and this power is possessed by minor as well as by adult fathers. Appointment by deed.

The appointment of a guardian by deed is in its nature testamentary.<sup>2</sup> It may be revoked by a subsequent will.<sup>3</sup> In a case where the father had appointed by a deed one of his creditors to be guardian of his children, and in that deed bound himself in a penalty not to revoke the deed, the court refused to interfere with the appointment. Though a will be not duly executed the court will respect the appointment of guardian therein made, and will appoint as guardian the person nominated by such will.<sup>4</sup>

A testamentary guardian, although he takes the place of all other guardians, and is placed *in loco patris*<sup>5</sup> having the same powers as the father over the infant, cannot delegate his trust to Powers of testamentary guardian.

<sup>1</sup> *Stuart v. Bute*, 9 H. L. Cas. 440; *In re Kaye*, L. R. 1 Ch. 390.

<sup>2</sup> *Ex parte The Earl of Ilchester*, 7 Ves. 348, 367.

<sup>3</sup> *Shaftesbury v. Hannam*, Finch 323.

<sup>4</sup> *Hall v. Storer*, 1 Young and Coll. Ex. 556.

<sup>5</sup> *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 123.

another, either during his lifetime or by will, and the trust does not pass to his executors or administrators.<sup>1</sup>

A will which simply contains an appointment of a guardian of his children by a father, and not disposing of personal property, is not entitled to probate.<sup>2</sup>

Form of  
appoint-  
ment.

It is not necessary that any special form of words should be used in appointing a guardian. The expression of the intention is alone requisite.<sup>3</sup>

The expressions "I expect my father will take care to see my child educated in the Protestant religion"<sup>4</sup>—"I desire that my son may be under the care of A. B."<sup>5</sup>—"I request Miss M., if she shall be alive at my decease, to take upon herself the management and care of the house and of my children,"<sup>6</sup> have each been held to be sufficient to effect a valid appointment; and in another case<sup>7</sup> Hardwicke, L. C., considered that the words "I direct that my wife shall have the education and maintenance of my children" might amount to a devise of the guardianship.

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<sup>1</sup> See Forsyth on the Custody of Infants, page 111, and cases cited in note (n) to that page.

See *In the goods of Francis Morton*, 3 Sw. and Pr. 422, and cases there cited.

<sup>2</sup> Simpson on the Law of Infants, p. 200.

<sup>3</sup> *Teynham v. Lennard*, 4 B. P. C. 302.

<sup>4</sup> *Bridges v. Hales*, Mos. 108.

<sup>5</sup> *Miller v. Harris*, 14 Sim. 540.

<sup>7</sup> *Mendes v. Mendes*, 14 Ves. sen. 89.

Individuals only can be appointed guardians, and where the testator appointed a trading partnership as a firm, and not as individuals, guardians of his children, the Court of Chancery refused to recognise the appointment,<sup>1</sup> and similarly a father cannot appoint a company or an institution, charitable, educational, or otherwise, guardians of his children. Who can be appointed.

If the father appoint testamentary guardians<sup>2</sup> or if guardians be appointed by the court,<sup>3</sup> the mother cannot interfere with such guardians, and interference by the mother with the latter class of guardians is contempt of the court appointing such guardians.<sup>4</sup> Lord Chancellor Cottenham, in *Talbot v. Shrewsbury*,<sup>5</sup> said: "When this case was before me in the autumn, I had considerable reason to believe that there was much misapprehension in the mind of the mother as to her rights as mother, and I thought it necessary to explain that in point of law she had no right to control the power of the testamentary guardian. It is proper that mothers of children thus circumstanced should know that they have no right as such to interfere with testamentary guardians."

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<sup>1</sup> *DeMazar v. Pybus*, 4 Ves 644.

<sup>2</sup> *Reynolds v. Teynsham*, 9 Mod. 40; 4 B. P. C. 302.

<sup>3</sup> See *Waine v. Waine*, M. R. 1 Aug. 1839, Chambers on Infants, p. 36. *Arnout v. Blessdale*, 4 Sim. 387.

<sup>4</sup> *Waine v. Waine*, M. R. 1 Aug. 1839, Chambers on Infants, p. 36.

<sup>5</sup> 4 Myl. and Cr. 683.

Right of  
mother.

On the death of the father, without having appointed any testamentary guardian, the mother becomes entitled to the charge and custody of her children, and the care of their education.<sup>1</sup>

Period of  
guardian-  
ship.

Such guardianship by the mother continues to the same extent as the guardianship of the father,—*i. e.*, over daughters, until they marry, and over sons, until they attain the age of majority,<sup>2</sup> and her rights with respect to consenting to the marriage of her children are, when the father is dead without leaving testamentary guardian, equal to those which were possessed by the father.<sup>3</sup>

Illegiti-  
mate chil-  
dren.  
English  
law.

By the English law an illegitimate child is looked upon as *nullius filius*,—the child of no body; and neither the father nor the mother has any legal right to the guardianship of it.<sup>4</sup> However, where the child is within the age of nurture,—*i. e.*, not seven years old,—the court will prefer the mother to the putative father;<sup>5</sup> but where the infant has passed that age, and is able to exercise a choice, the court will not recognize any right, even of the mother, to the custody of the child.<sup>6</sup> In the case of *Ex parte Knee*,<sup>7</sup> an infant illegitimate child had been placed,

<sup>1</sup> *Villareal v. Mellish*, 2 Swanst. 536; S. C., *Mellish v. De Costa*, 2 Atk. 14. See also *Roach v. Garvan*, 1 Ves. 158.

<sup>2</sup> *Mendes v. Mendes*, 3 Atk. 619, 624; 1 Ves. 91.

<sup>3</sup> *Eyre v. Shaftesbury*, 2 P. Wms. 116.

<sup>4</sup> Macpherson on Infants, p. 67, and cases there cited.

<sup>5</sup> *Ex parte Knee*, 1 B. & P., N. R., 148.

<sup>6</sup> *Re Lloyd*, 3 Man. & G., 547.

<sup>7</sup> 1 B. & P. N. R. 148.



with the consent of both parents, in the custody of a third person, and then removed by the father. Though the father was better able to maintain it, it was ordered to be delivered into the custody of the mother. In giving judgment, Mansfield, C. J., said :—"There is no affidavit before the Court to show any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely, indeed, that by granting this application we may be doing a great prejudice to the child, but still the mother is entitled to the child if she insist upon it. The application in this case may have arisen from pure affection, and the mother may be disposed to take care of the child ; but it is not probable that it will be so advantageously brought up under her care as under the care of some person whom the father approves of. The mother must have the child unless some ground be laid by affidavit to prevent it." This decision, however, does not seem to have been extensively followed, and where the putative father has obtained possession of the child, neither by force nor by fraud, with the exception of the decision in *Ex parte Knee*, there is no authority to show that the court will interfere with the custody of the infant.<sup>1</sup> In *R. v. Moseley*,<sup>2</sup> Lord Kenyon, C. J., said: "Where the father has

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<sup>1</sup> Forsyth on the Custody of Infants, p. 77.

<sup>2</sup> 5 East, 223 note.

the custody of the child fairly, I do not know that this court would take it away from him. But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before." And in *R. v. Hopkins*,<sup>1</sup> Lord Ellenborough said : "It appears that the mother of the child so called had the child in her quiet possession under her care and protection during the period of nurture. That she was first divested of her possession by stratagem, and after recovering it again was afterwards dispossessed of it by force. In such a case everything is to be presumed in her favour. Without touching, therefore, the question of guardianship, we think that this is a proper occasion for the court by means of this remedial writ (the writ of *habeas corpus*) to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint, leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle."

In fact, the court will generally, in a summary proceeding with respect to the custody of an illegitimate child, leave such child in the custody in which it finds it, provided that that custody was not obtained by force or fraud.

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<sup>1</sup> East, 579.

In one case where the child was eleven,<sup>1</sup> in another where the infant was eight years of age,<sup>2</sup> and in an anonymous case<sup>3</sup> in the Queen's Bench, on the 4th of June, 1874, where the child was twelve years of age, the court refused, at the instance of the mother, to interfere with the then custody of the child. In the last mentioned case, the father and mother had lived together for twelve years, and then he married another woman. The Judge had an interview with the child, and found her to be attached to both parents, but preferred remaining with the father.

Under the Hindu law, unlike the English law, an Hindu law. illegitimate child is not looked upon as *nullius filius*, but he is recognized as his father's son, and as such has a status and a right to maintenance in his father's family,<sup>4</sup> and unless the father's caste be above that of a sudra, an illegitimate son can inherit.<sup>5</sup>

This being so, the right to the guardianship of illegitimate offspring would, probably, be subject to the same rules as those which govern the right to the custody of legitimate children. It was, how-

<sup>1</sup> *Re Lloyd*, 3 Man. & Gr., 547.

<sup>2</sup> *In re White*, 10 L. T. 349.

<sup>3</sup> Simpson on the Law of Infants, p. 127.

<sup>4</sup> See Tagore Law Lectures, 1870, p. 172. *Mayna Bai v. Uttaram*, 2 Mad. H. C. Rep. 196.

<sup>5</sup> *Inderam Volungputty Taver v. Ramaswamy Pandia Talaver*, 3 B. L. R. P. C. 4. See *Mohun Singh v. Chumurun Rai*, 2 Sel. Rep. new edn.), p. 37 note.

ever, held by the Madras Supreme Court in the year 1814<sup>1</sup> that, according to the Hindu law, the mother of an illegitimate infant is entitled to the custody of it as against the putative father, where there appear no circumstances to control the right. But in this case the father did not contend for the custody, and the ruling seems to have proceeded upon no authority.

Mahomedan law.

The Mahomedan law in this respect, like the English law, does not recognise the right of a putative father to the custody of his illegitimate child, and it regards a bastard as the child of no father. The *futwa* of the Mahomedan law officer in the case of *Musst. Shahjehan Begum v. David Munro*<sup>2</sup> stated that "the Mahomedan law does not allow the putative father to interfere with his illegitimate child even for the purpose of education." According to Mahomedan law a *wulud-ooz-zina*, or illegitimate child, does not inherit from the father or on the father's side, but as his parentage on the mother's side is established, he on account of such parentage, inherits only from his mother and half brothers by the mother's side.<sup>3</sup> There seems to be no doubt that, under Mahomedan law, the right of a mother to the custody of her illegitimate children is co-extensive with, if not greater than, her right to

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<sup>1</sup> *The King v. Nagapen*, 2 Mad. Notes of Cases, p. 91.

<sup>2</sup> Reports S. D. A., N. W. P., Vol. V, p. 39.

<sup>3</sup> Tagore Law Lectures, 1873, p. 123.

the custody of her legitimate children. She is entitled to the charge of the persons of female illegitimate children until they attain the age of puberty,<sup>1</sup> and inasmuch as the putative father cannot interfere with the charge of his illegitimate children even for the purpose of education,<sup>2</sup> the mother and her relations would, probably, be held entitled to the guardianship of male illegitimate children beyond the period of *hizanut*.

It does not, however, follow because a child is illegitimate by English law that he is a *wulud-ooz-zina* by Mahomedan law, and if he be not the latter, there is nothing to prevent his putative father from having the right to his custody. For instance, the father might have acknowledged the child without admitting that it was the fruit of *zina* (illicit intercourse), and then, under certain conditions,<sup>3</sup> the paternity would have been established, though the child might be illegitimate according to English notions.

The right of guardianship of children, the result of intercourse between persons governed by different laws, is determined by the Hindu, Mahomedan, or English law, according as they have been brought up as Hindus, Mahomedans, or Europeans.<sup>4</sup>

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<sup>1</sup> Macnaghten's Precedents of Mahomedan Law, p. 326, chap. viii, case 11.

<sup>2</sup> Baillie's Digest of Mahomedan Law, p. 433 note.

<sup>3</sup> See Baillie's Digest of Mahomedan Law, p. 405.

<sup>4</sup> See *Myna Bayee v. Ditarum*, 8 M. I. A. 400.

## LECTURE III.

### THE COURT OF WARDS.

WE have, in the two preceding lectures, considered the age at which persons in Bengal attain majority, and the right, natural and testamentary, to the guardianship of their persons and property during their minority.

We now come to consider the provisions made by the law for the protection and benefit of minors.

In this respect we shall see some difference between the law affecting residents in Calcutta and that which governs the inhabitants of the other parts of the Presidency.

The Court  
of Wards,

The chief means provided by the law for the protection of the persons and properties of minor landholders in this province is the Court of Wards, which was, however, originally established more for the purpose of ensuring the collection of the revenue than for that of protecting minor proprietors.<sup>1</sup>

The reason  
for its  
establish-  
ment.

The provisions of the Decennial Settlement, which was subsequently made permanent by Reg. I of 1793, gave rise to the necessity for the management by Government of the estates of minors and other persons disqualified from managing their property.

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<sup>1</sup> See Markby's Lectures on Indian Law, p. 65.

In order to meet this necessity, and also in consequence of the many instances which occurred of minors, females, and other disqualified landholders, being entire proprietors of lands paying revenue immediately to Government, being reduced to ruin by the misconduct of those entrusted with their affairs, as well as of the frequent instances of minors being brought up in ignorance and dissipation by persons intrusted with their care and education, with a view to engross the management of their affairs when they might come of age,<sup>1</sup> the system of management of the estates of disqualified landowners by Government officials under the denomination of the Court of Wards was established.

This system was inaugurated on the 20th August, 1790, when the Governor-General in Council constituted the Board of Revenue a Court of Wards with powers to superintend the conduct, and inspect the accounts, of the managers of estates of landholders disqualified from having the management of their own lands by the rules prescribed for the Decennial Settlement (that is to say, females, with the exception of those whom the Governor-General in Council might deem competent to the management of their own estates, minors, lunatics, and persons of notorious profligacy of character, who not being partners with others of a different des-

The Board  
of Revenue  
constituted  
a Court of  
Wards.

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<sup>1</sup> See the Preamble to Reg. X of 1793.

cription were or might be entire proprietors of lands paying revenue immediately to Government). The Court of Wards also received instructions to see that minors received an education suitable to their rank and circumstances in life, such as might qualify them for the future management of their own concerns.<sup>1</sup>

Reg. X of  
1793.

For the guidance of the Board of Revenue as the Court of Wards certain rules were issued on the 15th of July, 1791, and with modifications were subsequently re-enacted in Reg. X of 1793. The general scheme of that Regulation was, that the estate and properties belonging to disqualified persons were to be managed by a *serberakar*, or manager, while their persons and education were committed to a guardian. Large powers were entrusted to the manager and guardian, who were, however, subject to the immediate control of the Collector and to the general superintendence of the Court of Wards. Like other Regulations, Reg. X of 1793 was rather a collection of instructions than a clear and concise enactment, and by it much was left to the discretion of the manager, the Collector, and the Court of Wards; but the Collector, manager, and guardian were made strictly responsible to the Court of Wards. The superintendence and care of infants and their estates seems, however,

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<sup>1</sup> See Colebrooke's Digest of the Regulations, Vol. III, pp. 298 and 299.



to have been practically centred in the Collector of each district, who performed, according to his discretion, nearly all the duties of the Court of Wards.

By Reg. LII of 1803, amended by section 29 of Reg. VIII of 1805, the rules for constituting and for fixing the jurisdiction of the Court of Wards, contained in Reg. X of 1793, were extended to the ceded and conquered provinces; and Reg. VI of 1822 extended Reg. LII of 1803, with the addition contained in section 29, Reg. VIII of 1805, to the province of Benares.

By Reg. I of 1829 the Commissioners of Revenue and Circuit were entrusted, within the districts comprised in their respective divisions, with the powers and authority then vested in the Boards of Revenue and Courts of Wards, subject to the control and direction of a sudder or head Board, to be ordinarily stationed in each Presidency, unless otherwise directed by the Governor-General in Council.<sup>1</sup> “From this time,” says Mr. Justice Markby,<sup>2</sup> “the administration of the law upon this subject seems to have fallen into some confusion. We very frequently find the Collector spoken of as acting ‘in his capacity of Court of Wards;’ and the Collector also appears to have exercised himself many of the functions which are conferred by the Regulation upon the manager or guardian.

<sup>1</sup> Sec. 4.

<sup>2</sup> Lectures on Indian Law, p. 67.

But for this concentration of power into the hands of the Collector there does not appear to have been any authority in law."

Act XXVI  
of 1854.

The Collector, however, was, by Act XXVI of 1854,<sup>1</sup> entrusted with the general superintendence and control of the education of male minors, whose property was under the Court of Wards; and he was by the same Act provided with sufficient powers for that purpose.

Act IV  
(B. C.) of  
1870.

In 1870 the law relating to the Court of Wards within the provinces subject to the control of the Lieutenant-Governor of Bengal, was consolidated and amended by Act IV of the Acts of the Bengal Council for that year, which contains the present law on the subject.<sup>2</sup> This Act came into operation

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<sup>1</sup> Repealed so far as relates to the provinces under the control of the Lieutenant-Governor of Bengal by Act IV (B. C.) of 1870, sec. 80.

<sup>2</sup> On the day this Lecture was delivered, the Bengal Legislative Council passed an Act, called the Court of Wards Act, 1877, for the purpose of amending the law relating to the Court of Wards within the provinces subject to the Lieutenant-Governor of Bengal. This Act has not yet received the assent of the Governor-General, and is, therefore, not yet in operation. When it comes into operation, Act IV (B. C.) of 1870 will cease to exist, as sec. 2 of the Court of Wards Act, 1877, provides as follows—"Bengal Act IV of 1870 (the Court of Wards Act) shall be repealed. This repeal shall not affect the validity or invalidity of anything done or suffered, or any right, obligation, or liability accrued before the commencement of this Act. And all rules prescribed, orders or appointments made, and agreements executed under the said Act shall (so far as they are consistent with this Act) be deemed to be respectively prescribed, made, and executed under this Act. And all suits and proceedings now pending, which may have been commenced under the said Act, shall be deemed to be commenced under this Act."

on the 1st of June, 1870, and by it the Commissioner of Revenue of each division is constituted a Court of Wards;<sup>1</sup> but his powers are to be exercised subject to the entire control and supervision of the Board of Revenue and of the Lieutenant-Governor,<sup>2</sup> and the Lieutenant-Governor has power to make rules for the fulfilment of the purposes of the Act.<sup>3</sup>

The Collector's position under the Court of Wards Act, 1870.

It is not easy to ascertain exactly what is the position of the Collector of a district under the Court of Wards Act of 1870. It is provided in Part IV of that Act that the Collector shall exercise the duties of the *Court* with respect to the ward and his moveable and immoveable property.<sup>4</sup> The *Court* is construed by the Act<sup>5</sup> to mean the Court of Wards,—i.e., the Commissioner of Revenue of the division.<sup>6</sup> The Collector cannot exercise all the duties of the *Court*, as the Act requires the Collector to deliver an inventory<sup>7</sup> and to make certain reports<sup>8</sup> to the Court, and all the orders and proceedings of the Collector under the provisions of the Act are subject to the revision of the Court, and to appeal to the Court by any person aggrieved by such order or proceeding.<sup>9</sup> It would be absurd to suppose that there could be an appeal from the Collector as Collector to himself as exercising the

<sup>1</sup> Sec. 8.

<sup>2</sup> Act IV (B. C.) of 1876, sec. 85.

<sup>3</sup> Sec. 84.

<sup>4</sup> Sec. 11, and following sections.

<sup>5</sup> Sec. 1.

<sup>6</sup> Sec. 8.

<sup>7</sup> See sec. 17.

<sup>8</sup> Secs. 19, 22, 31, 67. See also sec. 71.

<sup>9</sup> Sec. 18.

duties of the Court, or that such inventory should be delivered or reports made by the Collector in one capacity to himself in another capacity.<sup>1</sup> Again, it is clear that section 22 does not empower the Collector to make a final and conclusive order declaring the age of a disqualified proprietor. That section clearly contemplates such power as residing solely in the Commissioner.

The meaning of the direction in the eleventh section of the Court of Wards Act that the Collector shall exercise the duties of the Court with respect to the ward and his moveable and immoveable property seems to be that the Collector shall immediately superintend the ward's estate, and provide for the care of his person and education, and that the Commissioner should only act as a Court of appeal from the Collector, and when necessity arises for the exercise of his general powers of superintendence<sup>2</sup> or of those powers, which cannot be exercised by the Collector, but which the Act impliedly requires to be exercised by the Commissioner alone.

The Act itself raises, but does not expressly solve, this difficulty with respect to the position of the Collector. . There is, however, no doubt that the Act confers some powers and duties upon the Collector *quâ* Collector, and other powers and duties

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<sup>1</sup> See Markby's Lectures on Indian Law, p. 68.

<sup>2</sup> See Act IV (B.C.) of 1870, sec. 10.

on the Collector *quâ* Court of Wards; and, as Mr. Markby points out in his Lectures on Indian Law<sup>1</sup> there is consequently the greatest difficulty in keeping the distinction between the Court of Wards proper, the Collector exercising the functions and performing the duties of the Court, and the Collector as a district officer subordinate to the Court. Mr. Markby adds, "I am inclined to believe, that practically nearly everything is done by the Collector or by his direction, the sanction of the Commissioner being occasionally obtained; but this is getting rid of the difficulty rather than solving it."

All minor proprietors of entire estates,—*i. e.*, possessing in entirety any land subject to the payment to Government of revenue in respect of which the name or names of a proprietor or proprietors are entered on the general register of estates paying revenue immediately to Government in the Collector's office of the district<sup>2</sup>—other than proprietors who are subject to the jurisdiction as respects infants of a High Court,<sup>3</sup> are subject to the superintendence and direction of the Court of Wards,<sup>4</sup> and the Court of Wards may, at any

Who are  
subject to  
the super-  
intendence  
of the Court  
of Wards.

<sup>1</sup> Page 68.

<sup>2</sup> See the definition of '*estate*' in sec. 1.

<sup>3</sup> As to what persons are subject to the jurisdiction as respects infants of the High Court at Fort William, see *post*, Lecture V.

<sup>4</sup> Sec. 2. The Court of Wards Act, 1877, makes some changes and additions to the classes of persons subject to the Court of Wards. That Act proposes to subject to the superintendence of the Court of Wards all proprietors of entire estates (other than proprietors who

time, claim the guardianship of any such minor and the management of his property whether or not a certificate of administration of his property may have been granted by the Civil Court under the provisions of Act XL of 1858.<sup>1</sup>

When joint proprietors are so subject.

Where a minor does not possess an entire estate, but is only a joint proprietor with others, he is not subject to the superintendence of the Court of Wards, unless all his co-proprietors are disqualified.<sup>2</sup>

But under section 14 of Act XL of 1858,<sup>3</sup> when an estate, some of the co-proprietors of which are still minors, ceases to be subject to the

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are subject to the jurisdiction as respects infants and lunatics of a High Court) who are, or may be, females not deemed by the Court competent to the management of their own estates, or who are, or may be, under the age of twenty-one; all sons of such females who are, or may be, under the age of twenty-one; all joint proprietors of entire estates held in common tenancy, who are, or may be, under the age of twenty-one, and also any member of a ward's family who may have an immediate interest in the ward's estate, who is under the age of twenty-one, and who has no *legal guardian*. The words '*legal guardian*,' are somewhat ambiguous, and it is not clear whether they are intended to include only guardians appointed by a Court of law, or whether they embrace natural and testamentary guardians also. The former interpretation is the most probable one.

<sup>1</sup> *Modhoosoodun Sing v. The Collector of Midnapore*, B. L. R. F. B. R. 199; S. C. 3 W. R. C. R. 83.

<sup>2</sup> Sec. 3.—The Court of Wards Act, 1877, proposes to include amongst the persons subject to the superintendence and jurisdiction of the Court of Wards "all joint proprietors of entire estates held in common tenancy, who are or may be under the age of twenty-one," but the same Act also proposes to provide that the superintendence of the Court is not to extend to joint proprietors of estates any one of whom may not be disqualified.

<sup>3</sup> The provisions of Act XL of 1858 will be discussed in Lecture IV, *post*.

Court of Wards, the Collector may represent such fact to the principal Civil Court of original jurisdiction in the district and such Civil Court may direct the Collector to retain charge of the shares and persons of the minors. After such direction all further proceedings shall be had and taken according to the provisions of the Court of Wards Act, as if such still disqualified proprietors were proprietors of an entire estate; and in case any of the qualified proprietors shall so consent, the management of the shares of such qualified proprietors may be retained or assumed by the Collector and carried out under the provisions of the Court of Wards Act so long as it shall seem fit to the Collector and such qualified proprietors.<sup>1</sup>

The fact of a minor acquiring an estate, otherwise than in the regular course of inheritance on the death of the person to whom he may succeed in such estate, or under or by virtue of the will of, or some settlement made by, a deceased owner thereof, does not render him liable to be taken under the superintendence of the Court of Wards; but it is competent to the Board of Revenue "to direct the Court to take charge of any estate being the property of any disqualified person, or of any two or more persons, both or all of whom may be disqualified, although the same shall not have

How mode  
of acquisition of estate affects jurisdiction of Court.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 3.

descended to such person or persons in any regular course of inheritance or succession, nor accrued to him or them by devise or settlement as aforesaid, whenever the same shall appear to the Board of Revenue to be advisable for the interests of Government and of the proprietor or proprietors."<sup>1</sup>

"Such estates shall be considered in all respects, as far as regards the management of them by the Court, as if they had devolved to the proprietor or proprietors in the regular course of inheritance or succession, or accrued to him or them by devise or settlement as aforesaid : and such proprietor or proprietors shall, in all respects, be treated by the Court accordingly."<sup>2</sup> These latter words would, probably, give to the Court of Wards power to provide for the custody, maintenance, and education of the minor proprietors whose estates are thus brought under its superintendence. At least this seems to be the only interpretation which can be put upon the somewhat vague expression "such proprietor or proprietors shall in all respects be treated by the Court accordingly."

The Court of Wards cannot take upon itself the management of any estates other than those which the Court of Wards Act makes subject to its jurisdiction.<sup>3</sup>

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<sup>1</sup> Act IV (B. C. of 1870), sec. 4. See Reg. III of 1796.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 4.

<sup>3</sup> See *Rowshun Jehan v. The Collector of Purneah*, 14 W. R. C. R. 297.



We will now see how a minor proprietor and his estate are taken under the superintendence of a Court of Wards.

Mode of  
subjecting  
minors  
to the  
superin-  
tendence of  
the Court  
of Wards.

It is the duty of every Collector immediately upon his receiving credible information that the proprietor of an estate in his district is a minor, and subject to the superintendence and jurisdiction of the Court of Wards, to report the same to the Court of Wards of his division;<sup>1</sup> and whenever any Collector receives information that any proprietor of an estate within his district has died, and that the heirs of such persons are subject to the superintendence of the Court of Wards, he may take order for the safety and preservation of any moveable property of such deceased proprietor, and of all deeds, documents, or papers relating to any portion of the property of such proprietor, and for that purpose may cause the same or any part thereof to be removed to any public treasury or may place such guards in charge thereof as to him shall seem fit.<sup>2</sup> On receiving the report of the Collector, it then becomes the duty of the Court of Wards to direct the Collector to hold an enquiry as to the age of such alleged minor, and for the purpose of that enquiry the Act empowers the Collector "to require the production in person of such proprietor, if a male, and of all documents from which the

Collector to  
report to  
Court.

Collector to  
provide for  
safety of  
moveable  
property of  
deceased  
proprietor,  
leaving  
minor  
heirs.

Court to  
direct en-  
quiry.

<sup>1</sup> See sec. 19 of Act IV (B. C.) of 1870.

<sup>2</sup> See Act IV (B. C.) of 1870, sec. 20.

truth of such matter may appear, and to take evidence of witnesses upon oath or solemn affirmation. The Collector shall record such evidence, and report thereupon, and shall submit such report and all evidence taken by him to the Court."<sup>1</sup>

At this enquiry the alleged minor, if he denies that he is under age, would be entitled to appear or be represented.

Declara-  
tion of age  
of proprie-  
tor.

On the Collector's submitting to the Court his report on such enquiry, and the evidence taken therein, the Court shall make an order declaring the age of such proprietor, and such order shall be final and conclusive for all the purposes of the Court of Wards Act,<sup>2</sup>—that is to say, in any questions or disputes relating to the custody of the ward or the management of his property.<sup>3</sup>

When do-  
cumentary  
evidence to  
be handed  
over to  
ward.

The Court of Wards Act further provides,<sup>4</sup> that the Court shall retain all documentary evidence filed with such report until the minor shall have attained the age of eighteen years, unless, upon an application made thereto, it shall see fit to allow any such document to be restored to the owner thereof. This provision does not expressly require the Court to deliver over the documentary

<sup>1</sup> Act IV (B. C.) of 1870, sec. 22. See Reg. X of 1793, sec. 5, § 2.

<sup>2</sup> See sec. 22, Act IV (B. C.) of 1870.

<sup>3</sup> See *ante*, Lecture I, pages 10, *et seq.*: with reference to the interpretation to be put upon the words "for the purposes of this Act."

<sup>4</sup> Act IV (B. C.) of 1870, sec. 22. See sec. 78; *post* p. 138.

evidence to the ward when he attains the age of eighteen years ; but taken with the other provisions of the Court of Wards Act, it does so impliedly.

Now the Indian Majority Act,<sup>1</sup> which came into operation on the 2nd of June, 1875, provides,<sup>2</sup> that every minor under the jurisdiction of any Court of Wards shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before.

Thus, as the law at present stands, a Court of Wards might be required to hand over the documentary evidence to a person who is still a minor.<sup>3</sup>

In many other respects there is, as we saw in the first lecture, a difficulty in reconciling the provisions of the Indian Majority Act with those of the Court of Wards Act and other Acts in which, for their own purposes only, a particular age is defined as the age of majority.<sup>4</sup>

The next step, after the Court has made an order

Court to  
declare es-  
tate subject  
to its juris-  
diction.

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<sup>1</sup> Act IX of 1875.

<sup>2</sup> Sec. 3.

<sup>3</sup> In the Court of Wards Act, 1877, provision is made for the custody of the documentary evidence as follows: "The Court shall retain all the documentary evidence filed with such report until the proprietor shall have attained the age of twenty-one years, unless upon an application made thereto it shall see fit to allow any such document to be restored to the owner thereof."

<sup>4</sup> This difficulty will, as far as the Court of Wards is concerned, be set at rest if, and as soon as the Court of Wards Act, 1877, becomes law, as that Act throughout treats the age of twenty-one years as the age of majority of persons subject to the jurisdiction of the Court of Wards.

declaring the age of the proprietor, is for the Court, if it be satisfied that he is a minor, and subject to the jurisdiction of the Court of Wards, to make an order declaring his estate to be subject to the jurisdiction of the Court, and directing charge of such proprietor and of his property to be taken.<sup>1</sup>

Power to  
refuse to  
admit pro-  
prietor.

The Court may, if it shall think fit, by an order under its seal, refuse to admit any disqualified proprietor to be a ward of the Court; and after the estate of a disqualified proprietor has been taken charge of, the Court may, at any time, by a like order, and with the sanction of the Board of Revenue, discharge such estate from the Court's further superintendence and jurisdiction. The Court may, by a further order, rescind any such order, and make such disqualified proprietor a ward of the Court.<sup>2</sup>

Power to  
discharge  
estate.

Where a ward's estate has been discharged by the Court, the jurisdiction of the Court with respect to the custody, maintenance, and education of the ward would also cease, even though the ward be still a minor.

When the minor's estate is situate in more than one division, the Court of Wards of each such division would, apparently, have concurrent jurisdiction to make an enquiry as to his age, declare him a ward of the Court of Wards, or discharge

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 30.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 6.

him from the jurisdiction of the Court ; but after one Court has made an order under the provisions of section 22 of the Court of Wards Act<sup>1</sup> declaring the age of minor, the inquiry cannot be reopened by another Court of Wards.

When the minor's estate has been declared subject to the jurisdiction of the Court of Wards, and the Court has directed charge of the minor and his property to be taken, it becomes the duty of the Collector of every district, within which there may be any property of the ward, to take possession of such property, of whatever description it may be ; and the Court of Wards Act provides,<sup>2</sup> that the Court shall be held to be in charge of such property from the time when possession shall have been so taken. The same Act also provides,<sup>3</sup> that, when any person shall become a ward, the Court shall take charge of all property, real or personal, belonging to the ward, inclusive of any share in any joint undivided estate and of any tenures or shares of tenures of land.

How  
ward's pro-  
perty to be  
taken  
charge of.

Immediately on an estate being declared subject to the jurisdiction of the Court, the Collector must search for, and take possession of, all seals and such accounts and papers as it may appear to him advisable to take possession of, and shall, at his discretion, remove them to his own office, or send

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<sup>1</sup> Act IV (B. C.) of 1870.

<sup>2</sup> See Act IV (B. C.) of 1870, sec. 30.

<sup>3</sup> Sec. 5.

them to the custody of the Court. The Collector must also take possession of all moveable property belonging to the ward, and place under proper custody such portion thereof as he may think necessary.<sup>1</sup>

The Collector may break open any box or receptacle within any house or on any land in the actual possession of the ward for the purpose of searching for any seal, account-paper or property belonging to the ward.<sup>2</sup>

The custody of the proprietor pending enquiry as to his age.

With respect to the custody of a proprietor who is reported to be a minor, while an inquiry is proceeding as to his age, and until he has actually been declared to be subject to the jurisdiction of the Court of Wards, and a guardian of his person has been appointed, provision is made by the twenty-third section of the Court of Wards Act,<sup>3</sup> which runs as follows : "The Collector may direct that any person having the unlawful custody, or being unlawfully in possession of the person of any minor ward, shall produce him or her before the Collector on a day fixed by him, and may make such order for the temporary custody and protection of such minor as may appear proper. In the event of any disobedience to his orders under this section the Collector may impose a fine not exceeding five hundred rupees, and a daily fine not exceeding two

<sup>1</sup> Act IV (B. C.) of 1870, sec. 16. <sup>2</sup> Act IV (B. C.) of 1870, sec. 16.

<sup>3</sup> Act IV (B. C.) of 1870.

hundred rupees, until the production of the person of the minor.<sup>1</sup> In the case of a female minor ward she shall not be brought into Court."

This provision would, apparently, be also applicable so long as the proprietor remains a ward of the Court, and it may be made use of, when a guardian after being discharged refuses to give up the custody of the ward.

It is not easy to say what is the meaning of the expressions "unlawful custody" and "unlawfully in possession of" in the above section. This section may be intended to empower the Collector to require delivery of the minor proprietor from any one other than a guardian appointed by a Civil Court, or a natural or testamentary guardian; but it more probably means that this power can only be exercised by the Collector when the minor proprietor is in the custody of a person who has obtained possession by illegal means, or is unlawfully retaining such possession.

The Court of Wards Act<sup>1</sup> does not specify in what Collectors this power of enforcing by fine the delivery

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<sup>1</sup> This section does not empower the Collector to make a prospective order that the delinquent shall be fined a certain sum each day until production of the person of the minor. Each day's fine must be imposed after each day's offence. See *In the matter of Sagar Dutt*, 1 B. L. R. Or. Cr. 41; *In the matter of W. N. Love*, 9 B. L. R. App. 35; *In the matter of the Chairman of the Municipal Commissioners of the Suburbs of Calcutta v. Aneesooddeen Meah*, 12 B. L. R. App. 2.

<sup>2</sup> Act IV (B. C.) of 1870.

of the person of a ward lies. Does the Act intend to give this power to the Collector in whose district the infant resides, or to the Collector within whose district the infant's estate or a portion of it is situated? If the twenty-third section of the Court of Wards Act had been intended to apply only after the minor had been declared a ward of the Court, the Collector exercising the duties of the Court with respect to the person of the ward would probably be the Collector having this power. But the twenty-third section, from its position in the Act, seems to have reference more to providing for the custody of the minor while the enquiry as to his disqualification is pending, and at that stage the only Collector having anything to do with the minor or his estate is the Collector upon whose report the inquiry is made.

The charge  
of the  
ward's pro-  
perty.

As a general rule the Collector of each district must exercise the duties of the Court of Wards with respect to the moveable and immoveable property of the ward situate in his district, whether the estate or lands of the ward be situate in one district only,<sup>1</sup> in more than one district of the same division,<sup>2</sup> or in more than one division.<sup>3</sup>

When es-  
tate in  
more than  
one district  
of same  
division,

Where the ward's estate is in more than one district of the same division, the Court of Wards for that division may, with the sanction of the Board of Revenue, entrust to any one Collector the control of

<sup>1</sup> Act IV (B. C.) of 1870, sec. 11.    <sup>2</sup> Act IV (B. C.) of 1870, sec. 13.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 15.



the management of any portion of the ward's property not situate within his own district.<sup>1</sup>

Where the estate or lands of a ward are situate within two or more divisions, the Court in charge of the ward's person exercises a general control over all disbursements and payments connected with the ward's property wherever situate, and over the accounts of such property, and the Board of Revenue may direct that the Court in charge of the ward shall have the entire control of all or of portions of the ward's property wherever situate, under such form of management as may appear to such Board advisable, or to take any other action which may seem convenient for the due care of the ward's interests and the efficient management of his property.<sup>2</sup>

When the estate or lands of a ward are situated within one district, the Collector of the district in which the estate or lands of the minor are situate exercises the duties of the Court with respect to his person.<sup>3</sup>

When the estate is situate in more than one district of the same division, the Court of Wards in that division must appoint some one of the Collectors in that division to perform those duties.<sup>4</sup>

When the estate or lands of the ward are situate in more than one division, the Board of Revenue must determine the Court which shall have charge

<sup>1</sup> Act IV (B. C.) of 1870, sec. 13.    <sup>3</sup> Act IV (B. C.) of 1870, sec. 11.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 15.    <sup>4</sup> Act IV (B. C.) of 1870, sec. 12.

of the person of the ward, and such Court must appoint some one of the Collectors within its own division to exercise the duties of the Court with respect to the person of the ward.<sup>1</sup>

Collector to  
report partic-  
ulars of  
estate to  
Court.

Every Collector, on taking charge of a ward, must forthwith report to the Court in charge of such ward the condition of such ward, the particulars of his property, real and personal, so far as the same can be ascertained, and the persons who respectively may appear to be most eligible to be appointed manager and guardian to the ward.<sup>2</sup>

Collector to  
deliver in-  
ventory.

Within six months from the date of his taking possession of the ward's property, the Collector must deliver to the Court an inventory of the property so taken possession of.<sup>3</sup>

After receiving the report of the Collector as to the particulars of the ward's property, and the persons eligible to be appointed manager and guardian, it becomes the duty of the Court to fix an allowance for the ward and to appoint a guardian of his person and a manager of his estate.

Allowance  
for ward.

With respect to the former duty the Court of Wards Act<sup>4</sup> provides that "the Court shall allow, for the support of each ward and of his or her family, such monthly sum as may seem fit with re-

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 14.    <sup>3</sup> Act IV (B. C.) of 1870, sec. 17.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 31.    <sup>4</sup> Act IV (B. C.) of 1870, sec. 32.

gard to the rank and circumstances of the parties and their indebtedness or freedom from debt."

The manager<sup>1</sup> and the guardian<sup>2</sup> must be appointed by the Court in charge of the ward,<sup>3</sup> subject to the approbation of the Board of Revenue.

Appoint-  
ment of  
manager  
and guar-  
dian.

When the ward's estate is situate in more than one division, the manager appointed by the Court in charge of the ward shall be appointed manager of all other estates of such ward by the respective Courts in and for the divisions in which such estates respectively are situate; but any such Court may, with the assent of the Board of Revenue, appoint a separate manager for the estate or estates under its charge, or a sub-manager, who shall act under the orders of the manager.<sup>4</sup>

When two or more estates belonging to different wards are so situated that they may be conveniently superintended by one manager, the Court may entrust them to the same manager.<sup>5</sup>

When the produce of the ward's property is insufficient to provide for the expenses of a separate management, the Court of Wards must take such order as from the circumstances of the case appear best calculated for providing for the security of the public revenue and for the interests of the ward.<sup>6</sup>

Course to  
be adopted  
when pro-  
perty in-  
sufficient to  
provide for  
separate  
manage-  
ment.

In any case the Court of Wards may, instead of.

<sup>1</sup> Act IV (B. C.) of 1870, sec. 37.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 37.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 56.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 54.

<sup>3</sup> See *ante*, p. 113.

<sup>6</sup> Act IV (B. C.) of 1870, sec. 52.

appointing a manager, give some or all of the estates or lands of the ward in farm, or may adopt any other form of management; but the sanction of the Board of Revenue is requisite for a lease or farm given for a term exceeding ten years or beyond the period of expiration of the ward's minority,<sup>1</sup> and all leases made without the sanction of the Board of Revenue, whether they be made by the Court of Wards, or by the Collector acting for the Court, or by the manager, become null and void on the removal of the estate from the superintendence of the Court for whatever cause.<sup>2</sup>

The Court is unfettered in the choice of a manager, and character and capacity for the trust are apparently the only guides as to such selection. Certain rules, giving the preference to near relations of the ward and creditable servants of his family, were prescribed by Reg. X of 1793;<sup>3</sup> but it was soon found necessary to repeal this provision.<sup>4</sup>

Restric-  
tions upon  
appoint-  
ment of  
guardian.

With respect to the appointment of a guardian some restriction is placed upon the powers of the Court of Wards.

<sup>1</sup> As to the effect of a lease granted without any term of years, and without the sanction of the Board of Revenue, see *Mahomed Reza v. The Collector of Chittagong*, 15 W. R. (C. R.) 116.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 9. The Court of Wards Act, 1877, in addition to this provision, proposes to provide that no estate shall be leased in patni or other permanent undertenure, unless, in the opinion of the Court, subject to the express sanction of the Board of Revenue and the Lieutenant-Governor, such a lease is necessary for the protection of the estate. <sup>3</sup> Sec. 8. <sup>4</sup> See sec. 26 of Reg. VII of 1799.

The Act provides,<sup>1</sup> that “when a guardian of a minor ward shall have been appointed by will, such person shall be appointed his guardian by the Court, unless the Board of Revenue, after a report received from the Court, and after calling on the testamentary guardian to show cause, shall consider him disqualified or unfit.”

As we saw in the last Lecture, the father only, with the addition of the grandfather in the case of Mahomedans, can appoint by will guardians to his infant children; and although section 31 of the Court of Wards Act does not expressly limit this power to the father, yet, as it does not expressly extend that power beyond the father, it must be taken as leaving unaltered the law as to the appointment of guardians by will. Section 21 of Reg. X of 1793 gave to land-holders whose heirs were disqualified, the power to appoint guardians to such heirs by will in writing. This distinctly extended beyond the father the power of appointing guardians to minors, but this extension was not continued by the Court of Wards Act, and therefore, since the repeal of Reg. X of 1793, the appointment of a testamentary guardian by any person other than the father of the infant would not, in any way, bind the Court of Wards. Similarly, Act XL of 1858,<sup>2</sup> while recognising the right of the father to appoint by will

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<sup>1</sup> Sec. 31.

<sup>2</sup> See *post*, Lecture IV.

guardians to his children,<sup>1</sup> does not contemplate such appointment by any other person.

Heir of  
ward ineli-  
gible to be  
guardian.

Guardian  
of female  
ward.

No person who is the next legal heir of a ward, or otherwise is immediately interested in outliving such ward, may be appointed to be his guardian; but this provision does not apply to the mother or to the testamentary guardian of the ward.<sup>2</sup> None but a female may be appointed guardian of a female ward, and none but a person of the same religion, if Hindu or Mahomedan, may, except in the case of a testamentary guardian, be appointed guardian of a female ward, preference being given to female relatives if any such be eligible.<sup>3</sup> No guardian may be appointed or continued for a female ward if she has an adult husband.<sup>4</sup>

The offices of manager and guardian are wholly distinct.<sup>5</sup> The same person may, however, be appointed to be both guardian and manager; but he must render all such accounts, and perform all such duties, as are required from manager and guardian respectively and severally.<sup>6</sup>

Manager  
and guar-  
dian to  
give secu-  
rity.

The manager<sup>7</sup> and the guardian<sup>8</sup> must, previous to the receipt of their commissions of appointment,

<sup>1</sup> Sec. 7, Act IV (B. C.) of 1870.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 55.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 56.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 61.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 33.

<sup>6</sup> Act IV (B. C.) of 1870, sec. 35.

<sup>7</sup> Act IV (B. C.) of 1870, sec. 38.

<sup>8</sup> Act IV (B. C.) of 1870, sec. 59.

give security for the due performance of their duties,<sup>1</sup> and must execute agreements with the Collector in the form prescribed by the Court of Wards Act,<sup>2</sup> engaging to perform those duties, and agreeing to pay a penalty in the event of their committing a breach of trust, or neglecting or omitting to perform any portion of their duties. No security can however be required from a testamentary guardian performing the duties of manager,<sup>3</sup> or guardian,<sup>4</sup> and the Board of Revenue have, in any case, power to dispense with the security.<sup>5</sup>

All documents executed by a manager or guardian by virtue of his office must be signed and sealed with his own name and seal, and he must add to his name his description of manager or guardian of the ward for whom he may act, as the case may be.<sup>6</sup>

The Court of Wards Act<sup>7</sup> provides, that the manager "shall have the care of the entire property, real and personal, of the ward, save estates or lands to which another manager may be appointed or which are under the direct management of a Collector. He shall have the exclusive charge of all

How documents to be executed by manager or guardian.

Powers of manager.

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<sup>1</sup> See Act XII of 1850, sec 1.

<sup>2</sup> Schedules A and B.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 38.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 59.

<sup>5</sup> Act IV (B. C.) of 1870, secs. 38 and 59.

<sup>6</sup> Act IV (B. C.) of 1870, sec. 36.

<sup>7</sup> Act IV. (B. C.) of 1870, sec. 45. See also sec. 34.

lands,<sup>1</sup> save as aforesaid, whether malgoozary or lakhiraj; as well as of all houses, tenements, goods, money, and moveables of whatever nature belonging to the ward whose estate may be committed to his charge, excepting only the house wherein such ward may reside, the moveables wanted for his use, and the money allowed for the support of the ward and the members of his family entitled to a provision; but every manager shall be subordinate to the Court and to the Collector under whose superintendence the estate or lands may be."<sup>2</sup>

Seals, title-deeds, and securities to be delivered to Collector.

Every manager must deliver to the Collector in charge of the estate of which he is manager, and every guardian must deliver to the Collector in charge of the ward, all family seals belonging to the ward,<sup>3</sup> and all title deeds or Government or other securities belonging to the ward's estate;<sup>4</sup> and the Collector must deposit such seals where the Court may order,<sup>5</sup> and must transmit such deeds and securities to the Court in charge of the ward, or deposit them in his public treasury according to the direction of

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<sup>1</sup> By sec. 114 of Act X of 1859 the manager may exercise the power, of distraint vested by sec. 112 of that Act in persons entitled to receive rent from cultivators of land.

<sup>2</sup> The Court of Wards Act, 1877, proposes to provide that the Lieutenant-Governor may, at any time, declare any manager to be no longer subordinate to the Collector, and may order him to be directly subordinate to the Court or to the Board of Revenue.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 36.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 50.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 36.



the Court. Similarly, all title-deeds and documents relating to land purchased out of the surplus proceeds of the ward's estate, and all Government paper securities and other securities and shares purchased thereout, must be deposited in such public treasury as the Court may direct ; but all interest or dividends which may become payable on Government or other securities or shares must be paid to the manager, and must be accounted for by him in his monthly account current.<sup>1</sup>

Interest of  
dividends  
to be paid  
to manager.

It is the duty of the manager to manage the property, the care of which is entrusted to him, diligently and faithfully for the benefit of the proprietor, and to use every means in his power to improve the same for the benefit of the minor, and to act in every respect for the interest of the minor, in like manner as if the estate were his own. He must observe in all respects the provisions regarding managers contained in the Court of Wards Act, and must derive no personal benefit from the management beyond the remuneration granted to him as manager.<sup>2</sup> The manager is a trustee of the property for the benefit of the infant, and save in so far as they are expressly declared or limited by the Act, his duties and powers are the same as those of other trustees.

The duty  
of the  
manager.

The manager must report to the Collector the

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 50.

<sup>2</sup> See the agreement in Sched. A of Act IV (B. C.) of 1870.

nature and amount of any debts payable out of the property in his charge; and the Collector shall, without delay, report the same to the Court, and in such report shall state his opinion respecting the best mode of satisfying the same.<sup>1</sup>

Application of monies received by manager.

All monies received by the manager must be applied by him, in the first place, in payment of the allowance fixed for the support of the ward, and of all charges of management; and subject to those payments the manager must apply such monies in discharge of the monthly kists of Government revenue.<sup>2</sup>

Attachment of money in hands of Collector or manager.

In case any attachment be issued from any Civil Court against any sum of money which may be in the hands of the Collector or manager, the payment of the charges of management, and of all Government revenue, which may, for the time being, be due from the estate of such ward, has priority over such attachment,<sup>3</sup> and no payment can be made to the attaching creditor from any such sum until full provision has been made for the payment of such charges and revenue.<sup>4</sup> The Court of Wards

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 67.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 46. The Court of Wards Act, 1877, proposes to add to this provision the following: "And subject to the approval of the Board, in payment of such charitable and other allowances as were paid out of the proceeds of the estate before it came under the management of the Court, or such customary allowances or donations as the Court may authorize to be paid."

<sup>3</sup> See also Reg. X of 1793, sec. 12, para 2.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 47.

Act makes no provision with respect to an attachment of the ward's lands or of his moveable property other than money.

The manager must deliver to the Collector in charge of the estate monthly<sup>1</sup> and annual<sup>2</sup> accounts of his receipts and disbursements in respect of the estate under his charge, and it is the duty of the Collector to audit such accounts and provide for the due application of the surplus receipts.

Accounts to be delivered by the manager.

When portions of the estate are in different districts of the same division, such accounts must be rendered to the Collector in charge of the ward.

When the property of the ward consists of different estates or lands, or parts of the same estate or land situate in different divisions, it is optional with the Board of Revenue to order that the accounts for the lands in each district shall be submitted to the Collector of that district, or to the Collector in charge of the ward, or to the manager or sub-manager.<sup>3</sup>

The liability of a manager or sub-manager to account for his receipts and disbursement continues, notwithstanding he may be removed or otherwise cease to fill such office; and when any present manager or sub-manager, or past or present officer subordinate to a manager or sub-manager, wil-

Power of Court to fine manager for neglect or refusal to account.

<sup>1</sup> Act IV (B. C.) of 1870, sec. 48.    <sup>2</sup> Act IV (B. C.) of 1870, sec. 51.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 53.

fully neglects or refuses to deliver his accounts or any property in his hands within such time as may be fixed by the Court, the Court may impose on him a fine not exceeding 500 rupees, and in addition to any other remedy for the recovery of such fine, every such fine is a demand recoverable as an arrear of revenue.<sup>1</sup>

This power to fine recusant managers and others cannot be strictly said to be one of the duties of the Court with respect to the ward and to his moveable and immoveable property, and therefore the Commissioner can alone exercise this power.

How surplus income to be disposed of.

When it appears from the monthly accounts rendered by the manager that, after providing for the expenses of management, the payment of the ward's allowance, and the Government revenue for the month, there is a surplus in the hands of the manager, such surplus may, at the Collector's discretion, with the sanction of the Court, be carried to the credit of the ward;<sup>2</sup> but the Act does not specify in what account the surplus is to be carried to the credit of the ward,—whether it is to remain in the hands of the manager, or whether it is to be paid into the Government treasury. The surplus may be applied in liquidation of any debt which may affect the property of the ward or any part thereof; or, if no such debts be outstanding, it may be expended by

<sup>1</sup> Act IV (B. C.) of 1870, sec. 44. <sup>2</sup> Act IV (B. C.) of 1870, sec. 49.

the manager, subject to the discretion of the Court, for the improvement of the lands of the ward, or otherwise for the benefit of the property under his charge.<sup>1</sup> The surplus may also be applied, by the direction and with the privity of the Court in charge of the ward, in the purchase of other landed property, or at interest upon Government security, or in the purchase of Government paper securities or such other securities, stocks or shares guaranteed by the Government of India and approved of by the Board of Revenue, as to the Court may seem fit.<sup>2</sup> No part of the surplus can be invested in any mortgage security.<sup>3</sup>

In every suit brought by or against the ward in any Court other than the High Court, he must be therein described as a ward of Court; and the manager of his estate and no other person, except by leave of the Court of Wards, shall be his next friend or guardian in such suit. If the ward have no manager, the Collector in charge of the ward

Suits by  
and against  
wards.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 49. The Court of Wards Act, 1877, in addition to this proposes to provide, "that the amount so expended shall not exceed ten per centum of the said surplus, unless, in the opinion of the Court, subject to the express sanction of the Board and the Lieutenant-Governor, it is desirable for the protection and in the interest of the estate to expend an amount exceeding such percentage."

<sup>2</sup> Act IV (B. C.) of 1870, sec. 50. See *ante* p. 120 as to the custody of these securities.

<sup>3</sup> Such investment was allowed by Reg. X of 1793, sec. 18.

must be named and act as his next friend or guardian.<sup>1</sup>

No suit can be brought, except in the High Court, on behalf of a ward, without the authority of the Court in charge of such ward,<sup>2</sup> and every process which may be issued out of any Civil Court other than the High Court against any ward, must be served through the Court of Wards upon the next friend or guardian in the suit of such ward, and upon the Collector in charge of the estate of such ward.<sup>3</sup> Thus the process must be delivered to the Court of Wards, which becomes responsible for the further service upon the Collector and the manager or other person who may be appointed next friend or guardian to the infant.

In every suit brought by or against a ward of Court, he must be described as a ward of the Court

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 69.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 72. As to the power of the Collector to authorize the manager to bring a suit, see *In the matter of Kalee Dass Roy*, 18 W. R. C. R. 466. The Court of Wards Act, 1877, proposes, in place of this provision, to substitute the following: "No suit shall be brought in behalf of any ward unless the same be authorized by some order of the Collector under whose superintendence the estate of such ward may be, or if the Lieutenant-Governor has, under sec. 49, declared the manager of the estate of such ward to be directly subordinate to the Court or to the Board, then by some order of the Court or the Board as the case may be: provided that suits for arrears of rents may be brought on behalf of a ward, if authorised, by an order of the manager or sub-manager in whose charge the estate may be." As to the sec. 49 above referred to, see *ante* p. 120, note 1.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 71.

of Wards suing or being sued by the manager of his estate or other person appointed his next friend or guardian *ad litem*.<sup>1</sup> This course must be strictly adopted in order to bind the ward by the decree,<sup>2</sup> and it is not proper to make the manager plaintiff or defendant, even though he be described as the manager of the ward's estate.<sup>3</sup> In the conduct of a suit brought by or against a ward, the manager or other next friend or guardian *ad litem* must act subject to the control and orders of the Court of Wards; and if costs are decreed against him as such next friend or guardian, they shall be paid by the Court out of any property of the ward which for the time being may be in its hands<sup>4</sup> or under its charge. But where such next friend or guardian *ad litem* is ordered by the Court making the decree to pay any costs personally, the Court of Wards cannot recoup him out of the estate of the ward.

Full powers are given to the Court of Wards to compromise claims made by or against its wards. The Court of Wards Act provides,<sup>5</sup> that "it shall be

Compromise of claims.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 69.

<sup>2</sup> See *Abdool Hye v. Baboo Mitterjeet Singh*, 23 W. R. C. R. 348; *Sreenarain Mitter v. S. M. Kishen Soondery Dassee*, 11 B. L. R. 191.

<sup>3</sup> *Abdool Hye v. Baboo Banee Pershad*, 21 W. R. C. R. 228; *Mongola Dassee v. Saroda Dassee*, 12 B. L. R. App. 2; S. C. 20 W. R. C. R. 48. See, however, *Komul Chunder Sein v. Surbessur Dass Goopto*, 21 W. R. C. R. 298.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 70.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 73.

lawful for the Court to submit to arbitration, or otherwise to compromise, any claim which may be made by or on behalf of or against any ward, and every such submission to arbitration or compromise shall have the same force and effect as if the ward were not subject to any disqualification, and had personally entered into such submission or compromise; and for the purpose of any such compromise, any conveyance executed by the Collector under the orders of the Court shall be valid to pass the estate and inheritance, right, title, and interest in the property therein comprised of the ward, and of all persons whom such ward, if not disqualified, could have bound by a conveyance made for the payment of the debts of the ancestor from whom such property descended."

Compromise of suits.

This power would, apparently, extend to suits and other legal proceedings. There is, however, this difficulty. It is the duty of a Civil Court to ascertain for itself whether the compromise of a suit brought by or against a minor is for the minor's benefit. The Civil Court can only recognise the parties actually before it, and the powers given by section 73 are not given to the next friend or guardian *ad litem*, but to the Court of Wards, which cannot be a party to the suit. Therefore, as far as the Civil Court is concerned, the law as to the compromise of a suit by a guardian or next friend is not altered, and it is still the duty of such Court



to ascertain whether the compromise is for the benefit of the minor. Apart from the sanction of the Civil Court, a compromise by the Court of Wards has the effect only of a compromise out of Court.

The remuneration of the manager must be fixed by the Court with the assent of the Board of Revenue, and it may be subsequently altered or varied.<sup>1</sup>

Remuneration of manager.

On the nomination of the Collector, after consultation with the manager, the Court in charge of the estate is required to fix an establishment of necessary officers to act under the manager or sub-manager.<sup>2</sup>

Establishment how fixed.

The manager and all persons employed in the management of the estate of any ward are deemed to be officers in the pay of Government in respect of their employment and remuneration.<sup>3</sup>

In the Court of Wards Act all that is said as to the duties and rights of a guardian appointed under the Act is, that he is to have the superintendence and care of the person and maintenance of the ward,<sup>4</sup> and the right to the custody of the person of every ward not being an adult female. In the absence of a guardian the Collector in charge of the ward has the right to the custody of his person.<sup>5</sup>

Powers of guardian.

<sup>1</sup> Act IV (B. C.) of 1870, sec. 39.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 41.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 42.

<sup>4</sup> Sec. 34.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 61.

As we have seen the Court of Wards Act<sup>1</sup> excludes from the charge of the manager the house wherein the ward resides, the moveables wanted for his use, and the allowance for the support of the ward and his family. The charge of these would, apparently, belong to the guardian, although the Act gives no express direction to this effect.<sup>2</sup>

The education of the ward.

With respect to the ward's education the Court of Wards Act seems to give no powers to the guardian.<sup>3</sup> The general superintendence and control of his education is vested by the Court of Wards Act<sup>4</sup> in the Court of Wards; and the Civil Courts have no power to interfere with the orders of the Court of Wards in respect of a ward's education or residence.<sup>5</sup> The Court of Wards may direct that any male minor shall reside either with or apart from his guardian at the sudder station of the district or at any other place approved of by the Board of Revenue, and shall attend, for the purposes of education, such school or college as to the Board of Revenue may seem expedient, or be educated either at his own home or elsewhere by a private tutor, and the Court may make such provision as may be necessary for the proper care and suitable maintenance of the ward while attending such

<sup>1</sup> Sec. 45, *ante* p. 119.

<sup>2</sup> See R<sup>g</sup>. X of 1793, sec. 15.

<sup>3</sup> See Reg. X of 1793, sec. 27.

<sup>4</sup> IV (B. C.) of 1870, sec. 64.

<sup>5</sup> *The Collector of Beerbhoom v. Munkadinee Debia*, W. R. 1864, p. 332.

school or college.<sup>1</sup> The expenses incurred for the education of the minor, or by reason of his residence in any place other than his own home, are to be defrayed from the profits of his property,<sup>2</sup> and not apparently out of the allowance fixed for his maintenance.

As with a manager the duty of a guardian may be best summed up in the terms of the agreement into which he has to enter. He must execute the trust committed to him diligently and faithfully, and according to the provisions regarding guardians contained in Part VII of the Court of Wards Act; and he must derive no advantage directly or indirectly from the ward's allowance beyond the remuneration granted to him as guardian.<sup>3</sup> Duties of guardian.

The remuneration of the guardian is fixed by the Court,<sup>4</sup> and, together with the expense of an establishment of necessary servants,<sup>5</sup> is defrayed from the allowance fixed for the support of the ward. Remuneration of guardian.

The Court must fix the establishment of servants, but the appointment and dismissal of such servants would belong to the guardian. Establishment of servants.

Like the manager, the guardian must deliver monthly and annually, accounts to the Collector, who Accounts of guardian.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 65.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 66.

<sup>3</sup> See Schedule B of Act IV (B. C.) of 1870.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 58.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 60.

must audit the same and cause any surplus to be paid into Court to the credit of the ward, and applied for the increase of the ward's property.<sup>1</sup>

Removal of  
manager,  
guardian,  
and other  
officers.

The Court by which any manager or guardian or other person has been appointed, may, with the assent of the Board of Revenue, remove such manager or guardian or other person, and may order the person so removed to make over, within a time fixed by the Court, any property in his hands to such person as the Court may direct to receive the same, and to account to such person for all monies received and disbursed by such manager or guardian. Similarly a Collector may remove any officer appointed by himself, and may order any officer so removed to deliver his accounts or any property in his hands.<sup>2</sup>

Mode of  
enforcing  
orders.

The Court may enforce these orders by the imprisonment in the civil jail of the person disobeying the same, and by attachment of his property, and keeping it under attachment until the accounts or property shall have been delivered up.<sup>3</sup> The Collector has apparently no power to enforce his orders; but they can be enforced by the Court.

Every order for imprisonment by the Court is subject to appeal to the Board of Revenue.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 62.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 43.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 43. The diet-money of the person imprisoned shall be paid out of the proceeds of the ward's estate.

In case of any breach of trust or neglect of duty by a manager or guardian, he may be sued by the Collector under the engagement entered into by him on taking up his appointment. By that engagement<sup>1</sup> he agrees that, in the event of any breach of trust, neglect, or omission in the performance of his duties, he will pay to the Collector a certain sum fixed in the agreement as liquidated damages. The Collector can, however, only recover reasonable compensation for the actual damage to the ward's estate caused by such breach of trust or other default, not exceeding the amount of the penalty named in the agreement.<sup>2</sup>

Remedies  
against de-  
faulting  
managers  
and guar-  
dians.

All monies which may be recovered from any manager under the provisions of his obligation, have to be carried to the credit of the estate of the ward.<sup>3</sup>

Defaulting managers and guardians may also be sued under the provisions of Act XII of 1850. The Court of Wards Act provides, that every manager, sub-manager, or guardian of the estate or person of a person subject to the Court of Wards shall be held to be a public accountant under the provisions of Act XII of 1850.<sup>4</sup> Act XII of 1850

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<sup>1</sup> See schedules A and B of Act IV (B. C.) of 1870.

<sup>2</sup> See sec. 74 of the Indian Contract Act, IX of 1872. As the manager and guardian cannot be said to perform any public duties or acts in which the public are interested, their engagements cannot be said to come within the exception to that section.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 40.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 42.

provides<sup>1</sup> that the person or persons at the head of the office to which any public accountant belongs may proceed against him and his sureties for any loss or defalcation in his accounts, as if the amount thereof were an arrear of land revenue due to Government.<sup>2</sup> The Collector would, apparently, be the head of the office to which the manager and guardian belongs; and would, therefore, be the proper person to proceed under Act XII of 1850.

In addition to these special modes of proceeding against the managers and guardians of wards of the Court of Wards, those persons are affected with the same liabilities as ordinary managers and guardians; and they, as well as the Collector,<sup>3</sup> or any other person professing to have acted under the authority of the Court of Wards, may be sued for any act done by them in opposition to the Court of Wards Act, or for any breach of their respective trusts, either by the ward, during his minority, with a properly constituted next friend, or after the ward's estate has ceased to be under the superintendence of the Court by the ward, or the heir or successor to his estate.<sup>4</sup>

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<sup>1</sup> Sec. 4.

<sup>2</sup> As to the procedure for the recovery of arrears of revenue, see Act XI of 1859, and Act VII (B. C.) of 1868.

<sup>3</sup> See *Rajah Anundnath Rae v. Collector of Rajshahye*, S. D. A. 1850, p. 301; *Collector of Sarun v. Ramlal*, S. D. A. 1854, p. 247.

<sup>4</sup> See Act IV (B. C.) of 1870, sec. 82, and Reg. X of 1793, sec. 32.

Where a ward's property is managed wholly or in part under the system of farms held direct from the Collector, or is managed direct by the Collector, the Collector must<sup>1</sup> prepare and submit to the Court the same accounts that are ordered to be prepared by the manager when the property is managed by a manager;<sup>2</sup> but when the estate is managed by the Collector, the Act does not give to the Court the same power to invest the surplus as it has in the case of the estate being managed by a manager.<sup>3</sup>

Management of the estate by farms or direct from the Collector.

There is one peculiarity in the case of farms held direct from the Collector, which does not hold when a farm is held from a manager, namely, that farmers and others holding tenures in estates in charge of the Court direct from the Collector are subject to the same rules, Regulations, and Acts as are applicable to other persons holding similar tenures and interests under Collectors of land revenue;<sup>4</sup> but this provision only applies to tenures which the Collector has himself created during his management under

<sup>1</sup> Act IV (B. C.) of 1870, sec. 76.

<sup>2</sup> See *ante*, p. 122.

<sup>3</sup> See Act IV (B. C.) of 1870, sec. 50.

<sup>4</sup> Act IV (B. C.) of 1870, sec. 75. The Court of Wards Act, 1877, proposes to add to this provision that "All arrears of rent due to the Collector from farmers and others holding tenures in estates in charge of the Court which accrued before the estate came under the charge of the Court shall be deemed to be demands under sec. 1 of Act VII (B. C.) of 1868, and shall be leviable as such." This clause "does not apply to arrears of rent enhanced after issue of notice under sec. 13 of Act X of 1859, or under sec. 14 of Act VIII (B. C.) of 1869, but of which the enhancement has not been confirmed by any competent Court."

the Court of Wards, and does not apply to any tenures which have been created previous to the management of the property by the Court of Wards.<sup>1</sup>

Power of  
Court to  
sell or  
mortgage.

The Court of Wards Act<sup>2</sup> gives to the Court of Wards full powers to sell or mortgage any property of a ward, with the consent of the Board of Revenue, for the purpose of liquidating debts, raising money for the costs of suits, or for the purchase of any share of any property, of which the ward may be a co-sharer, and for the default in payment of the revenue of which the ward's share may, under the provisions of Act XI of 1859, be liable to sale; and for the purpose of any such sale or mortgage, any conveyance executed by the Collector in charge of the ward under the order of the Court passes the estate and inheritance, right, title, and interest in the property in such conveyance mentioned of such ward and of every person whom such ward, if not disqualified, could bind by a conveyance made for the payment of the debts of the ancestor from whom such property descended.

Power to  
partition  
off portion  
of estate

If the property so ordered to be sold or mortgaged be part of an estate of which such ward be

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<sup>1</sup> *The Collector of Chittagong v. Kala Bibi*, 15 B. L. R. 343; S. C. 24 W. R. C. R. 149. The Court of Wards Act, 1877, if it becomes law, will, however, alter this, and will place tenures created before the estate came under the charge of the Court upon the same footing in this respect as tenures created after the estate came under such charge.

<sup>2</sup> IV (B. C.) of 1870, sec. 68.



the sole proprietor, or if it be a share of an estate separated under Act XI of 1859, and if it appears to the Court that it be to the interest of such ward or of the Government that such part or share be formed into a separate estate prior to such sale or mortgage being effected, the Court may direct the Collector, within whose jurisdiction such part or share be situate, to partition it off into a separate estate, and such partition must be conducted in accordance with the law which may for the time being be in force for the partition of estates.<sup>1</sup>

The possession of the estate of a minor proprietor by the Court of Wards cannot be disturbed by any proceeding under the Curators Act.<sup>2</sup>

The Court of Wards may apply for relief under that Act against wrongful possession of a property to which the minor is entitled to succeed.<sup>3</sup> And in case a minor, subject to the Court of Wards, shall be the party on whose behalf an application is made under that Act, the Judge, if he determines to cite the party in possession, and also appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the suit without taking security. If the minor shall, upon the adjudication of the summary suit provided for in that Act, appear to be entitled to the property, possession shall be delivered to the Court of Wards.<sup>4</sup>

<sup>1</sup> Act IV (B. C.) of 1870, sec. 68.

<sup>2</sup> XIX of 1841, sec. 16.

<sup>3</sup> See sec. 2.

<sup>4</sup> Sec. 16.

Termination  
of  
wardship.

We next come to the procedure provided by the Court of Wards Act on the termination of the wardship of the wards of the Court of Wards. The 77th section provides, that "whenever an estate shall cease to belong to a disqualified proprietor, or it shall be considered advisable to remove an estate from the superintendence and jurisdiction of the Court, the Court shall make an order that the superintendence and jurisdiction of the Court over such estate shall cease on a date not more than sixty, and not less than fifteen days from the date of such order. Immediately on issue of this order, a copy of such order shall be posted up in the office of the Court, and copies thereof shall be sent to the Collector in charge of the ward, and to every Collector in charge of any estate or property of such ward, and every such Collector shall forthwith, on receipt of such copy, notify the intended cessation of the Court's charge by a notice put up in such Collector's office, and in some conspicuous place on the estate."

And the 78th section further provides, that "when an estate under the Court of Wards is released from the superintendence of such Court, a list in duplicate of the papers to be delivered, and of all immoveable and moveable property, which may be in the custody or charge of the Court, or of any Collector or manager, shall be made by such officer of the Court as the Court may direct, and such papers and moveable property shall be given up to

the late ward or other person who shall succeed to his estate, with one of the lists, on a receipt being affixed to the other, signed either by the late ward or the person who shall succeed to his estate, or by some person authorized to act on his behalf; also a complete account of the management, while under the superintendence of the Court, of the property of the proprietor of such estate from the beginning, shall be prepared by the manager or Collector (as the case may be) and submitted to the Court, and a copy thereof given to the late ward or to the person who shall succeed to his estate."

On the death of the ward, if the succession to his property or any part thereof be in dispute, the Court may continue the charge of such property, or part thereof, until an order for making over the possession shall have been made by a competent Court,<sup>1</sup> and may, with the sanction of the Board of Revenue, if within one year after the death of the ward, the succession to whose property or some part thereof is in dispute, no suit be instituted to determine the right to the property, either make over the property to any claimant thereof, or cause the same to be sold by public auction, and the proceeds thereof,

Powers of Court in case of dispute as to succession on death of wards.

<sup>1</sup> Act IV (B. C.) of 1870, sec. 79. The Court of Wards Act, 1877, proposes to provide in this case that the Court may either make over such property or part of such property to any person claiming such property, or may continue the charge and management thereof until the right of such claimant has been determined by the Collector under Act VII (B. C.) of 1876, sec. 55, or by a competent Court.

after deducting therefrom sums payable to Government, to be invested in Government promissory notes; such notes to be held by the Court in trust for the person who may be entitled thereto.<sup>1</sup>

Such sale passes the right, title, and interest in the property so sold, of such deceased ward and of every person claiming by, through, or under such deceased ward, or by way of succession, inheritance, remainder or reversion, depending on the estate of such ward.<sup>2</sup>

While, after the ward's death, the property remains in the hands of the Court in consequence of the succession thereto being in dispute, the Court, the Collector, and the manager, all possess exactly the same powers as they possessed during the lifetime of the ward, and a suit can be brought on behalf of or against the estate of the ward during such period.<sup>3</sup> The Court of Wards Act does not say who ought to represent the estate in such suit.

Age at  
which  
wardship  
terminates.

As the law at present stands, it is a question whether the Court of Wards Act has power to retain charge of the minor's estate and person after he has arrived at the age of eighteen years.<sup>4</sup>

The Court of Wards Act<sup>5</sup> defines the word minor as a person under the age of eighteen years. The Indian Majority Act<sup>6</sup> provides that every minor

Act IV (B. C.) of 1870, sec. 80. <sup>2</sup> Act IV (B. C.) of 1870, sec. 81.

<sup>3</sup> *Mussamut Soomungul Kooer v. The Court of Wards*, 17 W. R. C. R. 561.

<sup>4</sup> See Lecture I, *ante*.

<sup>5</sup> IV (B. C.) of 1870, sec. 1.

<sup>6</sup> IX of 1875, sec. 3.

under the jurisdiction of any Court of Wards shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before. It is doubtful what effect, if any, this provision has upon the special definition of the word 'minor' in the Court of Wards Act.<sup>1</sup>

In addition to the other benefits derived by infants from the management of their property and the care of their persons by the Court of Wards, their estates, when taken charge of by that Court, are, while under its superintendence, exempt from sale for arrears of revenue;<sup>2</sup> but this exemption in the case of persons whose estates have not accrued to them in the regular course of inheritance, or under or by virtue of the will of, or some settlement made by, some deceased owner thereof, is confined to arrears of revenue accruing due whilst the estate is under the superintendence and jurisdiction of the Court.<sup>3</sup>

Exemption of ward's estate from sale for arrears of revenue.

The share of a ward of the Court in a joint undivided estate is not liable to sale for recovery of arrears of revenue, or for other demands similarly recoverable, until after the end of the year in which such arrears accrued.<sup>4</sup>

Share of joint undivided estate.

Where the Court of Wards has refused to take charge of a minor's estate, or having taken charge

Estate which Court has

<sup>1</sup> See *ante* Lecture I, and Revenue Rules for April, 1875, Rule 1. This difficulty will be set at rest if the Court of Wards Act, 1877, comes into force.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 2.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 4. <sup>4</sup> Act IV (B. C.) of 1870, sec. 5.

refused to  
take charge  
of or has  
discharged.

of it has discharged it from further superintendence, such estate, if the sole property of the minor, or of two or more minors, and descended to him or them by the regular course of inheritance, or by virtue of the will of some deceased owner thereof, can not, during the nonage of the proprietor or proprietors, be sold for arrears of revenue accruing subsequently to his or their succession to the same.<sup>1</sup>

Where  
estates sold  
for any  
other cause  
than arrears  
of revenue.

If any of these estates which are exempted from sale for arrears of revenue are sold for any other cause during the superintendence of the Court,<sup>2</sup> or, where the estates are not under the superintendence of the Court, during the minority of the proprietors, arrears of revenue are a first charge upon the proceeds of such sale; but this provision is not applicable to the case of a sale of the minor's share in a joint undivided estate.<sup>3</sup>

The exemption from sales for arrears of revenue, given to estates not under the superintendence of the Court, only applies to cases where due notice of the fact that the estate is the sole property of a minor, or the property of two or more minors, has been given to the Collector, and been acknowledged by him before the sale.

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<sup>1</sup> Act IV (B. C.) of 1870, sec. 6. This exemption does not include property which has come to the minor by virtue of a settlement made by a deceased owner thereof.

<sup>2</sup> Act IV (B. C.) of 1870, secs. 2 and 4.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 5.

When the revenue of estates, which, though not under the superintendence of the Court of Wards, are exempt from sale, falls into arrear, the revenue authorities may farm the estate for a period not exceeding ten years, nor exceeding the time when the minor shall have attained his majority.<sup>1</sup>

Power of  
revenue  
authorities  
to farm  
estates.

The proceeds of such farm of the estate must be paid to the Collector, who, after deduction of the amount of the claims of the Government for revenue, may, with the sanction of the Board of Revenue, either pay the same to the person authorized to receive it for the minor,—that is to say, the person entitled to the charge of the minor's property, or may dispose of it by carrying it to the credit of the minor, or by applying it in liquidation of any debt which may affect the property of the minor or any part thereof, or by expending it for the improvement of the lands of the ward, or otherwise for the benefit of the minor's property;<sup>2</sup> but the Collector has, apparently, no power to invest this surplus in the purchase of other landed property, or of securities of any description.

The Civil Courts cannot interfere with or question the arrangements made by the Court of Wards under the discretion given to it by the Court of

Civil  
Courts can-  
not inter-  
fere with  
discretion  
of Court of  
Wards.

<sup>1</sup> Act IV (B. C.), 1870, sec. 6. See *Mahomed Reza v. The Collector of Chittagong*, 15 W. R. C. R. 116, as to the effect of a lease for a longer period.

<sup>2</sup> Act IV (B. C.) of 1870, secs. 7 and 49.

Wards Act,<sup>1</sup> and no civil action will lie against the Court of Wards in respect of any thing done by it regarding the person or education of any minor entrusted to its superintendence.<sup>2</sup>

The position of the Court of Wards is very different from that of ordinary trustees. They are public functionaries appointed by the Legislature to perform certain duties. The established rule in English law is, that Courts of Equity will not interfere with the acts of public functionaries who are exercising special public trusts or functions, so long as those functionaries confine themselves within the exercise of those duties which are confided to them by the law. The Courts will not interfere to see if any order passed by such functionaries is a good or a bad order; but if they act against the law, or assume to themselves powers which the law does not give them, the Courts will treat them merely as persons dealing with property without legal authority.<sup>3</sup>

The Court of Wards must confine itself to the duties imposed upon it by the Acts of the Government, and cannot undertake other duties, as for

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<sup>1</sup> *Ranee Shurut Soonderee Debia v. The Collector of Mymensingh*, 7 W. R. C. R. 221.

<sup>2</sup> *The Collector of Beerbhoom v. Munkadinee Debia*, W. R. 1864, 332.

<sup>3</sup> Story's Equity Jurisprudence, 12th edn., Vol. II, sec. 955a. See ante p. 134 as to suits against Collectors and others professing to act under the Court of Wards.



instance those of executor or administrator to the estate of a deceased person.<sup>1</sup>

Apart from the above provisions for the protection of his person and property, the Court of Wards Act makes no alteration in the status or capacity of a minor ward with respect to contracts or otherwise except as regards his power to adopt. The Court of Wards Act provides that no adoption by any ward and no written or verbal permission to adopt given by any ward is to be deemed valid without the previous consent of the Lieutenant-Governor, on application made to him through the Court and the Board of Revenue.<sup>2</sup> Even with such consent the ward would not be able to adopt or give permission to adopt unless he had arrived at years of discretion.<sup>3</sup>

Adoption  
by ward.

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<sup>1</sup> See *Rowshun Jehan v. The Collector of Purneah*, 14 W. R. C. R. 295.

<sup>2</sup> Act IV (B. C.) of 1870, sec. 74. The Court of Wards Act, 1877, proposes to validate the adoption by the subsequent consent of the Lieutenant-Governor.

<sup>3</sup> See *Rajendro Narain Lahoree v. Saroda Soonduree Debia*, 15 W. R. C. R. 548 ; and *Jumoona Dassya v. Bamasoondari Dassya*, 1. L. R. C. S. 289 ; S. C. L. R. 3 I. A. 72.

## LECTURE IV.

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### THE APPOINTMENT OF GUARDIANS BY CIVIL COURTS IN THE MOFUSSIL.

WE now come to consider the appointment by the Civil Courts in Bengal of guardians of the persons, and managers of the property, of infants. This subject divided itself into two heads,—the first relating to appointments by the High Court, and the second relating to such appointments made by the Civil Courts outside the limits of the town of Calcutta. The subject of the present lecture will be the appointment of guardians and managers by Mofussil Civil Courts.

We have seen in the last lecture that, in respect of certain classes of minors, the Court of Wards has power to appoint guardians of their persons and managers of their estates ; and that such appointments made by the Court of Wards cannot be interfered with by any Civil Court.

Soon after the establishment of the Court of Wards, it was found necessary to give to the Civil Courts powers to nominate guardians of minors outside those classes. The first step in this direction was the enactment of Reg. I of 1800, which authorised Zillah Judges, under certain circumstances, to nominate guardians to disqualified landholders not subject to the authority of the Court of Wards.

Reg. I of  
1800.

This Regulation, with others<sup>1</sup> relating to the same subject, was repealed by Act XL of 1858, which provides a machinery for the appointment of managers of the estates and guardians of the persons of minors (not being European British subjects)<sup>2</sup> residing outside the limits of the original civil jurisdiction of the High Court.<sup>3</sup>

Act XL of 1858 provides<sup>4</sup> that, "for the purposes of this Act, every person shall be held to be a minor who has not attained the age of eighteen years." The effect of this provision has been sufficiently discussed in the first lecture.<sup>5</sup> Throughout this present lecture I shall use the word "minor" as meaning a person who has not attained the age of eighteen years.

Act XL of 1858 declares<sup>6</sup> that, "except in the case of proprietors of estates paying revenue to Government, who have been or shall be taken under the protection of the Court of Wards, the care of the persons of all minors (not being European British subjects),<sup>7</sup> and the charge of their property, shall be subject to the jurisdiction of the

Act XL of  
1858.

Age of  
majority  
under Act  
XL of 1858.

Who are  
subject to  
the juris-  
diction of  
the Civil  
Court.

<sup>1</sup> See sec. I of Act XL of 1858.

<sup>2</sup> As to the appointment of guardians of European British subjects, see *post* Lecture V.

<sup>3</sup> See *Callychurn Mullick v. Bhuggobuttychurn Mullick*, 10 B. L. R. 231; Lecture I, *ante*, p. 16.

<sup>4</sup> Sec. 26.

<sup>5</sup> *Ante*, pp. 8 to 23, and p. 32.

<sup>6</sup> Sec. 2.

<sup>7</sup> As to what are "European British subjects," see *ante*, Lecture I, p. 24; and *Byjenauth Singh v. Charles Reed*, 2 Morley's Digest, p. 336.

‘*Civil Court*’—that is to say, the principal Court of ordinary original civil jurisdiction in the district.”<sup>2</sup>

Act XL of 1858 has no application in Calcutta,<sup>3</sup> but, with that exception, it applies to all minors in Bengal, who neither have been taken under the protection of the Court of Wards, nor are European British subjects. This Act applies to those who are subject to the superintendence and jurisdiction of the Court of Wards,<sup>4</sup> provided that the Court of Wards has either neglected, or, in the exercise of the discretion given it in that behalf by the Court of Wards Act,<sup>5</sup> has refused to admit the minor to be its ward, or has discharged the minor’s estate from its further superintendence and jurisdiction ; but it is competent for the Court of Wards at any time to rescind such order of refusal, or discharge,<sup>6</sup> and the fact that a certificate of administration to

<sup>1</sup> See *post*, pages 156 and 158.

<sup>2</sup> See sec. 29; see also sec. I of Act IX of 1861. *Maharanees Ram Bunsee Koonwaree v. Maharanees Soobh Koonwaree*, 7 W. R. C. R. 321; S. C. 2 Ind. Jur. N. S. 193; and *Musst. Harasundari Baistabi v. Musst. Joyadurga Baistabi*, 4 B. L. R. App. 36; S. C. 13 W. R. C. R. 112.

<sup>3</sup> Sec. 29 of Act XL of 1858 provides, that the expression “Civil Court” as used in that Act shall not include the Supreme Court, and that nothing contained in that Act shall be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction. See *Callychurn Mullick v. Bhuggobutty churn Mullick*, 10 B. L. R. 240; S. C. 19 W. R. C. R. 582; *ante*, p. 16.

<sup>4</sup> As to who are so subject, see Act IV (B. C.) of 1870, Part II; and *ante*, Lecture III.

<sup>5</sup> Act IV (B.C.) of 1870.

<sup>6</sup> Act IV (B.C.) of 1870, sec. 6.

the estate of a minor has been granted by a Civil Court,<sup>1</sup> or that any other proceedings have been taken under Act XL of 1858, does not prevent the Court of Wards from taking the minor and his estate under their protection.

Before a Civil Court has any jurisdiction to interfere under Act XL of 1858, it is necessary in the first place that the minor shall be resident within its jurisdiction,<sup>2</sup> and in the second place, that the minor be possessed of property<sup>3</sup> situate within the territorial limits of the Act,—that is to say, in any part of Bengal, except Calcutta,—or that he has a present right to, or a vested right to future possession of, such property;<sup>4</sup> but a certificate can be granted by the Court for the purpose of enabling the person to whom it is granted to bring, on behalf of the minor, a suit for the possession of property.<sup>5</sup>

It is immaterial whether the property of the infant be large or small, provided that he has

Minor must be resident within the jurisdiction of the Civil Court.

Minor must have property.

Property must be capable of separate management.

<sup>1</sup> *Modhoosoodun Singh v. The Collector of Midnapore*, B. L. R. F. B. R. 199; S. C. 3 W. R. C. R. 83.

<sup>2</sup> See sec. 5 of Act XL of 1858, and *Maganbhai Purshotumdas v. Vithobabin Narayan Shet*, 7 Bom. H. C. R. A. C. J. 7.

<sup>3</sup> *Ranee Mookhta Jumma Pat Mohadabee v. Puddolabh Bhunj Bahadoor*, 16 S. D. A. 376.

<sup>4</sup> *Nobinchunder Shaha v. Rajnarain Shaha*, 9 W. R. C. R. 582; see *ante*, Lecture I, p. 16.

<sup>5</sup> *Saroda Soonderee Dassee v. Tarinee Churn Chowdhry*, 6 W. R. M. R. 23; *Pauch Couree Mundul v. Bhuggobully Dossia*, 6 W. R. M. R. 47. See, however, *Sheo Nundun Singh v. Mussamut Ghumsam Kooree*, 21 W. R. C. R. 144.

property<sup>1</sup> capable of being separately managed. Where the joint property of an undivided joint family governed by the Mitakshara law is enjoyed in its entirety by the whole family, and not in shares by the members, one member has not such an interest therein as is capable of being taken charge of, and separately managed, under the provisions of Act XL of 1858. The proper remedy for those persons to seek who are interested in the welfare of the minor and desire to secure to him the full fruition of his rights in the family property, is to procure for him a present share in that property by applying to the other members of the family for a division, and if that application fails, to a competent Court for the same purpose.<sup>2</sup>

Object of  
Act XL of  
1858.

The object of Act XL of 1858 is not to supersede the rights of those entitled, either naturally, or by a will, to the guardianship of an infant's person or estate, but to place those persons under the control and subject to the supervision of the Civil Courts.

Suit cannot  
be instituted  
or defended  
without  
certificate.

In furtherance of this object, and in order to compel such persons to place themselves under the authority of the Civil Court, the Act provides<sup>3</sup> that

<sup>1</sup> *Goburdhun v. Girwur*, 3 Agra H. C. Rep. 92.

<sup>2</sup> *Sheo Nundun Singh v. Mussamut Ghunsam Kooeree*, 21 W. R. C. R. 143; and *Mussamut Ajhola Kooeree v. Baboo Digambur Singh*, 23 W. R. C. R. 206.

<sup>3</sup> Sec. 3.

no person shall be entitled to institute or defend any suit<sup>1</sup> connected with the estate of which he claims the charge, until he shall have obtained from the Civil Court a certificate of administration to the minor's property. This provision does not forbid friends or relatives of the minor other than those claiming the charge of his estate, bringing or defending suits on his behalf; but in practice it seems to have been treated as preventing all persons from doing so without a certificate of administration. Apart from the provisions of Act XL of 1858 any person can institute a suit as next friend of an infant,<sup>2</sup> and no certificate is required to authorise a person bringing or defending on behalf of an infant a suit unconnected with the infant's estate,<sup>3</sup> as for instance a suit for damages for an injury to the infant's person or reputation.

The rule that a person cannot institute or defend a suit brought in respect of the estate of an infant, of which he claims charge, seems to have no exception, and would include all persons however near

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<sup>1</sup> This would include appeals (*Sheoburut Singh v. Lalljee Chowdhry*, 13 W. R. C. R. 202) or any proceedings in the nature of a suit, as for instance, proceedings to enforce an award under the Civil Procedure Code. *Vasudev Vishnu v. Narayan Jagannath*, 9 Bom. H. C. Reps. A. C. J. 289.

<sup>2</sup> See Macpherson on Infants, p. 364; and Simpson on ditto, p. 438.

<sup>3</sup> See remarks of Phear, J., in *Sheonundun Singh v. Mussumut Ghunsam Kooeree*, 21 W. R. C. R. 143.

in relationship to the minor, not even the father,<sup>1</sup> mother,<sup>2</sup> grandmother,<sup>3</sup> or other natural guardians<sup>4</sup> of the minor being excepted.

Court having jurisdiction may allow relative to sue or defend suit without certificate.

When the property in respect of which the suit is brought is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any *relative* of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.<sup>5</sup> Where the minor has no relative able or willing to represent him in the suit, this permission cannot be given to any other person.

What Court can give permission.

Any Court having jurisdiction with regard to locality, value, &c., to try the suit ordinarily, may grant to a relative this permission;<sup>6</sup> but the application for such permission should be made to the Court in which the suit is to be brought. Such permission, however, may be given either by a

<sup>1</sup> *Madho Rao Apa v. Thahoor Pershad*, 3 Agra H. C. Rep. 127. *Sitaram Bhat v. Sitaram Ganesh*, 6 Bom. H. C. Rep. 250. *Musli. Etwari v. Ramnarayan Ram*, 4 B. L. R. App. 71; S. C. 13 W. R. C. R. 330.

<sup>2</sup> *Mussamat Dhunraj Kooeree v. Rajah Roodur Pertab Sing*, 3 Agra H. C. Rep. 300.

<sup>3</sup> *Mussamat Rutnee v. Misser Rughober Dyal*, 2 Agra H. C. Rep. 278.

<sup>4</sup> *Zorawar Singh v. Jawahir Sing*, 3 Agra H. C. Rep. 167. *Thahoor Bodh Singh v. Lochun Singh*, 3 Agra H. C. Rep. 220. *Lalla Boodhmul v. Lalla Gowree Sunkur*, 4 W. R. C. R. 71.

<sup>5</sup> Act XL of 1858, sec 3.

<sup>6</sup> *Mussamat Taramonee Chowdrain v. Mussamat Rajlukhee Chowdrainee*, 2 Hay's Rep. 575. This would include a Mofussil Court of Small Causes. *Khanto Bewah v. Nund Ram Nath*, 15 W. R. C. R. 369.



lower or an appellate Court,<sup>1</sup> and it may be given even if there is a properly-appointed certificate-holder; but in that case the permission should rarely be given.

It is the duty of the Judge trying a suit, to which a minor is a party, to see that the minor is properly represented. He should see that the person suing or defending a suit on behalf of an infant is provided with a certificate of administration, or, if there be sufficient reason, should permit him to act without such certificate. The fact that the opposite party does not raise or press the objection does not relieve the Judge from this duty.<sup>2</sup>

This permission, if it is to be given, should be given before the suit is instituted or an appearance is entered on behalf of the infant.<sup>3</sup>

Though much is left to the discretion of the Judge in determining whether he should grant or refuse this permission, he must exercise that discretion rationally, and the rule requiring a person

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<sup>1</sup> *Hurendhur Lall Sahoo v. Maharajah Rajendur Purtap Sahae*, 1 W. R. 260. *Musst. Taramonee Chowdrain v. Musst. Rajlukhee Chowdrainee*, 2 Hay's Rep. 575.

<sup>2</sup> *Zorawar Singh v. Jowahir Singh*, 3 Agra H. C. Rep. 167. See *Sheoburrut Singh v. Lalljee Chowdhry*, 13 W. R. C. R. 202.

<sup>3</sup> In the case of *Aukhil Chunder v. Tripoora Soonduree*, 22 W. R. C. R. 525, it was held that the mere fact of the formal order granting permission not having been drawn up was not sufficient ground for dismissing the suit, the inference being that the Court, which admitted the plaint, intended to grant the permission.

instituting or defending a suit on behalf of an infant to possess a certificate of administration must not be relaxed without good cause.<sup>1</sup> As we shall see hereafter,<sup>2</sup> an infant is only bound by a decree or order in a suit or proceeding when he is represented by a properly-constituted guardian, and therefore he is not bound by the acts of a person purporting to act on his behalf, but who has not complied with the provisions of Act XL of 1858.

Appeal  
from orders  
giving or  
refusing  
permission.

It is a question whether the order refusing or granting permission to a person, not possessing a certificate of administration, to institute or defend a suit relating to the infant's estate is appealable.<sup>3</sup> Section 28 of Act XL of 1858 provides that "all orders passed by the Civil Court or by any subordinate Court under this Act, shall be open to appeal under the rules in force for appeals in miscellaneous cases from the orders of such Court and the subordinate Courts." The only orders which a subordinate Court, as distinguished from "the Civil Court," or principal Court of original jurisdiction in the district,<sup>4</sup> can pass under the Act, are orders giving or refusing permission to bring a suit on behalf of a minor

<sup>1</sup> *Rakhaldoss Mookherjee v. Peary Mohun Mitter*, 2 Sev. Rep. 191. For an instance of sufficient cause, see *Sreemunt Koondoo v. Sharoda Soonduree Dossee*, 8 W. R. C. R. 197.

<sup>2</sup> See Lecture XII.

<sup>3</sup> *Sreenath Koondoo v. Huree Narain Mudduck*, 7 W. R. C. R. 399. *Baboo Dhoondh Bahadoor Singh v. Baboo Priag Singh*, 17 W. R. C. R. 314.

<sup>4</sup> See Act XL of 1858, sec. 29.

without a certificate;<sup>1</sup> therefore, apparently, section 28 contemplates an appeal from such orders.

The High Court will not, in a special appeal, interfere with the permission granted by the lower Court.<sup>2</sup> If an appeal does lie, it must be of the nature of a miscellaneous appeal.<sup>3</sup>

Where a suit, which has been commenced on behalf of a minor by a person who has obtained neither a certificate nor the requisite permission, is still proceeding when the minor attains his majority, the minor may continue the suit on his own behalf.<sup>4</sup>

Every person who claims a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a certificate of administration to the estate of the minor,<sup>5</sup> and any relative or friend of a minor in respect of whose property such certificate has not been granted, or if the property consist in whole or in part of land or any interest in land, the Collector of the district may apply to the Civil Court to appoint a fit person

Who may  
apply for a  
certificate  
of adminis-  
tration.

<sup>1</sup> Sec. 6 gives the subordinate Courts power to make certain enquiries; but they could make no orders thereon until the passing of Act VI of 1871, sec. 27 of which gives to the High Court power to authorize a District Judge to transfer proceedings under Act XL of 1858 to a Subordinate Judge or Munsif in his district.

<sup>2</sup> *Nabadwip Chundra Sircar v. Kalinath Pal*, 3 B. L. R. App. 130.

<sup>3</sup> Act XL of 1858, sec. 28.

<sup>4</sup> *Madhub Chunder Chowdhry v. Buktessuree Debia*, 12 W. R. C. R. 102.

<sup>5</sup> Act XL of 1858, sec. 3.

to take charge of the property and person of such minor.<sup>1</sup>

To what  
Court ap-  
plication is  
to be made,  
where pro-  
perty situ-  
ate in more  
than one  
district.

Section 5 of Act XL of 1858 provides that, "if the property be situate in more than one district, the application for a certificate must be made to the Civil Court of the district in which the minor has his residence." By "residence" is not meant any house in which the minor may be temporarily dwelling at or about the time of the application;<sup>2</sup> but it refers to his usual dwelling-house which would, ordinarily, be his paternal family house, in which his family reside.<sup>3</sup> If the minor has abandoned the family house without any intention of returning thereto, it cannot be his "residence" within the meaning of the Act. The minor may, however, have two residences, and be living sometimes at one and sometimes at the other. In that case, during his temporary absence, each house, though empty, if there be an *animus revertendi*, will still be the residence of the minor; and the application can be made to the Court of the district in which either of these residences are situate; but it is more convenient and proper that the application should be made to the Court of the district in which is situate

<sup>1</sup> Act XL of 1858, sec. 4.

<sup>2</sup> See *Sheikh Mahommed Hossein v. Akbur Hossein*, 17 W. R. C. R. 275.

<sup>3</sup> See Story's Conflict of Laws, 6th edn., § 48. *R. v. The Duke of Richmond*, 6 Term. Rep. 561; *Whithorn v. Thomas*, 7 M. & G. 5.

that one of these residences which the minor is actually himself inhabiting at the time of the application, as it will be then easier for the Court to exercise its duties in appointing a guardian to the minor's person.

An application for a certificate of administration can be made at any time up to the time when the infant attains the age of majority,<sup>1</sup> and no lapse of time can of itself be any objection to the granting of a certificate,<sup>2</sup> as, if it were so, the infant's property might suffer through the negligence of those whose duty it would be to protect it.

The application for a certificate should refer merely to the property to which the minor is entitled, or of which the applicant claims charge, and it has nothing to do with the estate of any deceased person through whom the minor succeeds to any property,<sup>3</sup> as a certificate under Act XL of 1858 is entirely distinct from a certificate to collect the debts of such deceased person.<sup>4</sup>

A certificate under Act XL of 1858 is purely an authority for the administration of the property

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<sup>1</sup> See Act XL of 1858, sec. 26, *ante*, p. 147.

<sup>2</sup> See *Puroma Soonderee Dossee v. Tara Soonderee Dossee*, 9 W. R. C. R. 343; *aliter per* Ainslie J., in *Sheikh Mahomed Hossein v. Akbur Hossein*, 17 W. R. C. R. 275.

<sup>3</sup> *Koosumkaminee Dabee v. Chunderkant Mookerjee*, 23 W. R. C. R. 346. See also *Rajessurree Debi v. Jogendronath Roy*, 23 W. R. C. R. 278.

<sup>4</sup> *Raesunnissa Begum v. Ranee Khujoorunnissa*, 10 W. R. C. R. 462.

of the minor.<sup>1</sup> It gives a right to collect the debts due to the minor's estate; but where the debt is one owing to the estate of the deceased person, through whom the minor has obtained the property, payment of the debt cannot be enforced without a certificate under Act XXVII of 1860.<sup>2</sup>

Applica-  
tions under  
Act XL of  
1858 to be  
made to  
principal  
Court of  
district.

All applications for the grant or withdrawal of a certificate, or for any other purpose under Act XL of 1858, must be made to the principal Court of ordinary original civil jurisdiction in the district;<sup>3</sup> but the High Court may, from time to time, by order, authorize any District Judge to transfer to a Subordinate Judge or Munsif under the control of such District Judge, any proceedings or class of proceedings under Act XL of 1858.<sup>4</sup>

Procedure  
on applica-  
tion being  
made.

On an application being made for a certificate of administration under Act XL of 1858, the Court is required, by section 6 of that Act, to issue notice of the application, and to fix a day for hearing the same. On the day so fixed, or as soon after as may be convenient, the Court must enquire summarily into the circumstances, and pass orders in the case.

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<sup>1</sup> *Nobin Chunder Shaha v. Rajnarain Shaha*, 9 W. R. O. R. 582.

<sup>2</sup> *Raesunmissa Begum v. Ranees Khujoorunissa*, 10 W. R. O. R. 462.  
See *post*, p. 178.

<sup>3</sup> See *ante*, p. 148. Act XL of 1858 gives the power of appointing and removing guardians and certificate-holders and of otherwise providing for the care and persons of minors to the "Civil Court" which, by sec. 29 of the Act, is interpreted to mean the principal Court of original jurisdiction in the district.

<sup>4</sup> Act VI of 1871, sec. 27.

This procedure must be strictly followed: and no manager can be appointed, nor can any manager who has been appointed make over his trust to another, without the proper notices having been given and a day for the hearing having been fixed.<sup>1</sup> But the Act does not say in what way the notices are to be issued, or upon whom they are to be served; and there is no provision as to what class of persons may appear at the hearing and oppose the application.

The English rule of practice is, that a summons <sup>To whom notice to be given.</sup> for the appointment of a guardian must be served upon the persons who are within the same degree of relationship to the infant as the proposed guardian; and where the mother is proposed as a guardian, the uncles and aunts on the father's and mother's sides are required to be served.<sup>2</sup> Act XL of 1858 apparently leaves it to the discretion of the Court to determine upon whom notice of the application for a certificate of administration is to be served; but it is evident that notice should be given to all parties interested in the application; and these would include the natural guardians of the infant and his estate, the person in whose custody and under whose care the infant is at the time of the making <sup>Who may appear on the application.</sup> of the application, and the other near relations of the

<sup>1</sup> *Musst. Juggodumba Koer v. Musst. Mircha Koer*, 17 W. R. C. R. 269.

<sup>2</sup> Daniell's Chancery Practice, 5th edition, 1195.

infant. It has been held by a Division Bench of the High Court<sup>1</sup> that only persons themselves claiming to be appointed guardians have any *locus standi* to oppose an application for a certificate;<sup>2</sup> but it is clearly the right, if not the duty, of all those interested in the infant's welfare to see that a proper person be appointed to administer his property. An outsider, as for instance a creditor of the estate, has no right to appear.<sup>3</sup>

An application for a certificate cannot be made the means of contesting the minor's right to property, nor is a person to be permitted to appear solely for that purpose.<sup>4</sup>

Applicant,  
entitled to  
charge  
under deed  
or will.

If it appears that any person,<sup>5</sup> claiming a right to have charge of the property of a minor, is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court must grant a certificate of administration to such person.<sup>6</sup> The Court has no power to refuse a certificate to an applicant who proves his right to have

<sup>1</sup> E. Jackson and Onoocool Chunder Mookerjee, JJ.

<sup>2</sup> *Kistohishore Roy v. Issur Chunder Roy*, 15 W. R. C. R. 166. See *Meltoon Bibee v. T. M. Gibbon*, 12 W. R. C. R. 101.

<sup>3</sup> *Meltoon Bibee v. T. M. Gibbon*, 12 W. R. C. R. 101.

<sup>4</sup> *Puroma Soonduree Dossee v. Tara Soonduree Dossee*, 9 W. R. C. R. 343.

<sup>5</sup> This does not include the Court of Wards or a Collector, although named in the will or deed, 14 W. R. C. R. 114. See *Rowshun Jehan v. Collector of Purneah*, 14 W. R. C. R. 295; *Norendro Bhuttacharjee v. The Collector of Rajshahye*, 14 W. R. C. R. 113; and *ante*, Lecture III.

<sup>6</sup> Act XL of 1858, sec. 7.



charge of the property by a genuine will or deed of the person, through whom the minor has obtained the property, and it must prefer such person even to the natural guardians of the infant.<sup>1</sup> If he proves his title under the deed or will, the applicant is entitled as of right to a certificate, whether he be or be not a proper person to be permitted to manage the infant's property.

Act XL of 1858 leaves it doubtful<sup>2</sup> whether a person claiming by virtue of a will or deed a certificate of administration to the property of a minor, who is a beneficiary under such will or deed, is entitled to the charge of any property acquired by the minor otherwise than under such will or deed.<sup>3</sup> The Act does not expressly empower the Civil Court to limit the extent of the certificate-holder's authority over the property of the minor; but it must be remembered that Act XL of 1858 only confirms the rights of those who claim to manage an infant's property by reason of a valid appointment by a will or deed,<sup>4</sup> and it does not in reality extend the powers which such managers possess apart from Act XL of 1858. Apart from

To charge  
of what  
property he  
is entitled.

<sup>1</sup> *Puroma Soonduree Dossee v. Tara Soonduree Dossee*, 9 W. R. C. R. 343. See also *Roodur Chunder Roy v. Bhoobunmohun Acharjee*, 16 S. D. A. Rep. 350; and *Bhoobun Mohinee Dabee v. Purnochunder Banerjee*, 17 W. R. C. R. 99.

<sup>2</sup> See secs. 3 & 7.

<sup>3</sup> See Markby's Indian Law, p. 78.

<sup>4</sup> *Roodur Chunder Roy v. Bhoobunmohun Acharjee*, 16 S. D. A. 350.

the provisions of Act XL of 1858, any donor by will or deed of property to a minor may appoint a manager of such property during the minority of the donee; but he cannot impose any conditions or restrictions upon the management of property which the infant may have acquired otherwise than by such will or deed.

It has been held by the High Court that a certificate of administration to the property of a minor, granted under Act XL of 1858, must not specify the property in respect of which it is granted,<sup>1</sup> and that where a manager is appointed under that Act, the Civil Court has no authority to restrict or limit by description or otherwise the nature or extent of the minor's property.<sup>2</sup> In a proceeding under Act XL of 1858 the Court would have no power to make any binding declaration as to the amount or description of the minor's property; but there is nothing in the Act requiring the Court, when it grants a certificate of administration, to make that certificate applicable to the whole of the minor's property. It may occur that an infant has some property of which a person may claim to have charge by virtue of a will or deed, and also possesses other property, the charge of which such

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<sup>1</sup> *Feda Hossein v. Ranee Khajoorunissa*, 9 W. R. C. R. 459.

<sup>2</sup> *Per* L. S. Jackson, J., in *Sheo Prosunno Chobey v. Gopal Surn*, 15 W. R. C. R. 529; and *Collector of Tirhoot v. Rajcoomar Deo Nundun Sing*, 10 W. R. C. R. 218.

person cannot and does not claim. The Act does not surely compel the person claiming charge of a portion of the property of the minor to assume charge of the remainder. If this were the case, it might be possible for a stranger, by giving or devising property, however small, to an infant, and at the same time appointing a person to manage such property during the minority of the infant, to give to such a manager an absolute right to the control of any other portions of the infant's property, however they might have been acquired. It might also be argued that the principle of law and logic, that the greater power includes the less,<sup>1</sup> is applicable to the construction of Act XL of 1858; and that, therefore, it is competent for the Civil Court to grant a certificate to administer any portion of the infant's property. Such grant would, however, have no effect upon the rights of persons claiming such property adversely to the infant.

It has been held that more than one certificate of administration cannot be granted in respect of the same property;<sup>2</sup> but where there are several minors jointly interested in the same property, there is nothing to prevent a separate certificate being granted in respect of the interest of each minor.<sup>3</sup> The Act does not prohibit the grant of a joint certi-

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<sup>1</sup> See Broom's Legal Maxims, pp. 174 to 177.

<sup>2</sup> *S. M. Sham Manna v. Ramdyal Goochoo*, 1 W. R. M. A. 3.

<sup>3</sup> *Rowshun Jehan v. The Collector of Purneah*, 14 W. R. C. R. 295.

ificate of administration to more than one person,<sup>1</sup> and this course would, apparently, have to be adopted where two persons are jointly entitled under a will or deed to the management of the minor's property.<sup>2</sup>

Costs of enquiry.

In all enquiries held by the Civil Court under Act XL of 1858, the Court may make such order as to the payment of costs by the person on whose application the enquiry was made, or out of the estate of the minor or otherwise as it may think proper.<sup>3</sup>

Where no applicant, entitled to charge under deed or will.

If there be no person entitled to have charge of the property of the minor by virtue of a will or deed, or if such person is unwilling to undertake the trust, the Court may grant a certificate to any near relative of the minor who is willing and fit to be entrusted with the charge of the minor's property.<sup>4</sup>

The Court may call upon the Collector or Magistrate to report on the character and qualification of any relative or friend of the minor who may be desirous or willing to be entrusted with the charge of his property or person;<sup>5</sup> but the Court itself,<sup>6</sup> before granting the certificate, must satisfy itself as to the applicant's fitness.<sup>7</sup> The Court is bound

<sup>1</sup> See *Nistarinee Debee v. The Collector of the 24-Pergunnahs*, 23 W. R. C. R. 330.

<sup>2</sup> See *Rajessuree Debia v. Jogendronath Dey*, 23 W. R. C. R. 278.

<sup>3</sup> Act XL of 1858, sec. 13.

<sup>4</sup> Act XL of 1858, sec. 7.

<sup>5</sup> Act XL of 1858, sec. 8.

<sup>6</sup> *Syed Hyder Reza v. The Collector of Purneah*, 22 W. R. C. R. 490.

<sup>7</sup> *Ramdyal Gooye v. Amritlall Khamaroo*, 9 W. R. C. R. 555.

to found its decision upon legal evidence, and after giving all parties concerned fair and reasonable opportunity of adducing before it such relevant evidence as they may think necessary and proper. It cannot adjudicate merely on the Collector's report.<sup>1</sup>

Though the Act<sup>2</sup> requires the Court to grant certificates of administration to near relatives in preference to all other persons, except those entitled under a will or deed, it does not state the degree of relationship to the minor within which persons are to be classed as "near relatives." It is impossible to conjecture what relatives are intended to be included in this term.

The Court must look as much to the fitness of a relative as to his propinquity, and when two relatives claim the right to administer the property of a minor, the Court is at liberty to disregard the latter qualification, and look to the former only.<sup>3</sup> In fact, in every case, fitness should be preferred to mere nearness of relationship;<sup>4</sup> but it is not the policy of Act XL of 1858 to prevent persons from performing their natural duties by the younger members of

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<sup>1</sup> *Syed Hyder Reza v. The Collector of Purneah*, 22 W. R. C. R. 490.

<sup>2</sup> Sec. 7.

<sup>3</sup> *Akima Bibee v. Azeem Sarung*, 9 W. R. C. R. 334; and *Khoo-dee-monee Dossee v. Koylas Chunder Ghose*, 4 W. R. M. A. 22.

<sup>4</sup> *Aman Khan v. Musst. Hoseena Khatoon*, 9 W. R. C. R. 548; and *Fuggoo Daye v. Ranah Daye*, 4 W. R. M. A. 3.

their family who may be deprived of their natural parents.<sup>1</sup>

Certificate  
to be given  
to near  
relative, if  
fit.

If there be a near relative fit to be appointed manager, and there be no person with a preferential claim, the Court must grant the certificate to him.<sup>2</sup> No definite rules can be laid down as to what constitutes fitness for a certificate. Each case must be governed by its own circumstances, and much is left to the discretion of the Judge; but the Judge cannot, on bare suspicion, assume that a relative proposed as manager will defraud a minor,<sup>3</sup> and the mere fact of a near relative being a *purdahnasheen* does not disentitle her to a certificate.<sup>4</sup>

In every case, in granting a certificate, the Court must consider the well-being of the infant's estate; and in appointing a guardian of his person, must look to the moral, bodily, and intellectual welfare of the infant. In one case<sup>5</sup> where two near relatives were fighting to get hold of the property, and the probability was that the minor would suffer if the property remained in the hands of either, the Court

<sup>1</sup> *Mahomed Saleh v. The Government*, W. R. 1864 M. R. 26.

<sup>2</sup> *Mussamut Kuruppool Kooer v. The Collector of Shahabad*, 20 W. R. C. R. 432.

<sup>3</sup> *Mahomed Saleh v. The Government*, W. R. 1864 M. R. 26; and see *Mrs. Anne Kolonas*, 16 S. D. A. 369.

<sup>4</sup> *Mussamut Kuruppool Kooer v. The Collector of Shuhabad*, 20 W. R. C. R. 432.

<sup>5</sup> *Mussamut Juggodumba Koer v. Mussamut Mircha Koer*, 17 W. R. C. R. 269.

was held to be right in declaring that neither was a fit person.

Such causes as disqualify a natural guardian from exercising his trust,<sup>1</sup> would disentitle him to a certificate or to an appointment as guardian by the Civil Court.

In determining the near relative to whom a certificate of administration is to be granted, Act XL of 1858 does not consider the personal law of the applicant with respect to his right of guardianship of the infant's person or estate. It authorises the Civil Courts to select a guardian without reference to the law of the parties; but it does not, however, prevent the selection of the guardian indicated by such law, if he be a fit person.<sup>2</sup>

Such law can be no guide,<sup>3</sup> though it may be some assistance to the Civil Courts in adjudicating on the right to a certificate of administration.

The Court may (unless a guardian has been appointed by the father) appoint the person to whom a certificate of administration has been granted, or any relative or friend of the minor, to be guardian of his person;<sup>4</sup> but the Court has no power to appoint a guardian of the person of a female whose husband is not a minor, or of any minor whose

Appoint-  
ment of  
guardian of  
minor's  
person.

<sup>1</sup> See *ante*, Lecture II, and *post*, Lectures V and VI.

<sup>2</sup> *Mohomuddy Begum v. Musst. Oomdutoonissa*, 13 W. R. C. R. 454.

<sup>3</sup> *Akimu Bebee v. Azeem Sarung*, 9 W. R. C. R. 334.

<sup>4</sup> Act XL of 1858, sec. 7.

father is living<sup>1</sup> and is not a minor, and the Court cannot appoint any person other than a female as the guardian of the person of a female. If a guardian of the person of a minor be appointed during the minority of the father or husband of the minor, the guardianship ceases as soon as the father or husband (as the case may be) attains the age of majority.<sup>2</sup>

Where a guardian is appointed under the above powers given to the Civil Courts, no provision seems to be made for the payment to him of any allowance in respect of the maintenance and education of the minor. He is not, as in the case of a guardian appointed by the Court of Wards<sup>3</sup> or under the other provisions of Act XL of 1858, entitled to any remuneration, and he, as well as the person to whom the certificate of administration is granted, must discharge the trust gratuitously.

As we have seen<sup>4</sup> no appointment of guardian can be made by the Civil Court where a guardian has been appointed by the father; but the Act is silent as to how such appointment may be made by the father, whether it should be by will or deed, or whether a verbal appointment is sufficient.<sup>5</sup>

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<sup>1</sup> This only applies to the appointment of a guardian of the person of the minor; *Mussamat Etwari v. Ramnarayan Ram*, 4 B. L. R. App. 71; S. C. 13 W. R. C. R. 230.

<sup>2</sup> Act XL of 1858, sec. 27.

<sup>3</sup> See Act IV (B. C.) of 1870, sec. 58; *ante*, Lecture III.

<sup>4</sup> *Ante*, p. 167. Act XL of 1858, sec. 7.

<sup>5</sup> See *ante*, Lecture II, with respect to the testamentary appointment of guardians.



If no title to a certificate be established to the satisfaction of the Court by a person claiming under a will or deed, *and*<sup>1</sup> if the Court be satisfied upon sufficient and legal evidence that there is no near relative willing and fit to be entrusted with the charge of the property of the minor, *and* if the Court shall think it to be necessary for the interest of the minor that provision should be made by the Court for the charge of his property and person, a different procedure, depending upon the nature of the minor's estate, must be followed.

Procedure when no title to a certificate is established.

If the estate of the minor consist of moveable property or of houses, gardens, and the like, the Court may grant a certificate of administration to the minor's estate to the Public Curator appointed under Section 19 of Act XIX of 1841. If there be no Public Curator for the district, the Court may grant a certificate of administration to any fit person whom it may appoint for the purpose.<sup>2</sup>

Where estate consists of moveable property and the like.

When the Court grants a certificate of administration, it must at the same time appoint a guardian to take charge of the person and maintenance of the minor. The person to whom a certificate of administration has been granted, may, unless he be the Public Curator, be appointed guardian.<sup>3</sup>

<sup>1</sup> Both those events must happen before further proceedings can be taken. *Syud Hyder Reza v. Collector of Purneah*, 22 W. R. C. R. 490. See *post*, p. 175, note 1.

<sup>2</sup> Act XL of 1858, sec. 10.

<sup>3</sup> Act XL of 1858, sec. 11.

Allowance  
to guar-  
dian.

If the person, appointed under this provision to be guardian, be unwilling to discharge the trust gratuitously, the Court may assign him such allowance, to be paid out of the estate of the minor, as under the circumstances of the case it may think suitable.<sup>1</sup>

Mainte-  
nance of  
minor.

The Court may also fix such allowance, as it may think proper, for the maintenance of the minor; and such allowance and the allowance of the guardian (if any) shall be paid to the guardian by the Public Curator or other person to whom, in default of such Public Curator, a certificate of administration has been granted.<sup>1</sup>

Allowance  
to certifi-  
cate-  
holder.

The Public Curator, or other administrator to whom *in consequence of there being no Public Curator* a certificate has been granted, is entitled to receive a commission not exceeding five per centum on the sums received and disbursed by him, or such other allowance, to be paid out of the minor's estate, as the Civil Court may think fit.<sup>2</sup>

Disposal of  
monies  
received by  
certificate-  
holder.

After deducting what may be required for the current expenses of the minor or of the estate, including the guardian's allowance, and his own commission or allowance, the Public Curator or other administrator so appointed must pay the balance of all sums received by him on account of the estate into

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<sup>1</sup> Act XL of 1858, sec. 11.

<sup>2</sup> Act XL of 1858, sec. 24.

the public treasury, and such balance may be invested from time to time in the public securities,<sup>1</sup> which would probably include only Government loans.

Within six months from the date of the certificate, the Public Curator, or other administrator to whom a certificate may be granted in default of a Public Curator, must deliver in Court an inventory of any immoveable property belonging to the minor, and of all such sums of money, goods, effects, and things as he may have received on account of the estate, together with a statement of all debts due by or to the same. He must also furnish annually, within three months from the close of the year of the era current in the district, an account of the property in his charge, exhibiting the amounts received and disbursed on account of the estate, and the balance in hand.<sup>2</sup>

If any relative or friend of a minor, or any public officer, by petition to the Court, impugns the accuracy of such inventory and statement or of any annual account, the Court may summon the Curator or administrator, and enquire summarily into the matter, and make such order thereon as it shall think proper, or the Court, at its discretion, may refer such petition to any subordinate Court.<sup>2</sup> The

Inventory  
of property  
belonging  
to minor,  
receipts  
and debts.

Accounts.

Power of  
Court to  
enquire  
summarily  
into inven-  
tory and  
accounts.

<sup>1</sup> Act XL of 1858, sec. 17.

<sup>2</sup> Act XL of 1858, sec. 16.

right of a next friend of the minor to obtain by means of the Civil Court a summary account of the dealings of the administrator is confined to the case of the Public Curator or other person appointed under the provisions of Section 10 of Act XL of 1858. Where a person claiming under a will or deed, or a near relative of the minor, has received a certificate of administration, a summary account cannot be required from him. In such case, the only remedy of a relative or friend of the minor is by a regular suit,<sup>1</sup> and there is no obligation upon such certificate-holder to file in Court, periodical, or any, accounts of monies realized and disbursed by him on account of the minor.<sup>2</sup>

Suit  
against  
manager  
for an  
account.

Section 19 of Act XL of 1858 provides that it shall be lawful for any relative or friend of a minor, at any time during the continuance of his minority, to sue for an account from any manager appointed under that Act, or from any person to whom a certificate shall have been granted under the provisions of that Act, or from any such manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then, or formerly, under his care or management, or of any sums of money or other property received by him on account of such

<sup>1</sup> *Ram Dyal Gooye v. Amrit Lall Khamaroo*, 9 W. R. C. R. 555.

<sup>2</sup> *Mussamut Sookholly Koonwer*, 6 W. R. M. R. 53; *Vallabhdas Hirachand v. Gohaldas Tejoran*, 3 Bom. H. C. Rep. A. C. J. 89.

estate. Such suit, however, cannot be brought unless some satisfactory reason is assigned for apprehending an injury to the estate of the minor by the administrator.<sup>1</sup>

It has been decided by the Bombay High Court that a suit brought to compel a minor's guardian appointed under Act XX of 1864,—which applies to the Bombay Presidency, provisions almost identical with those of Act XL of 1858—to account for his administration of the minor's estate, cannot be properly brought in the Court of a Subordinate Judge, or in any Court but in the principal Civil Court of the district where the property is situate, if it be in one district ; but if it be in more districts than one, then in the principal Civil Court of the district in which the minor has his residence.<sup>2</sup> The reasons for this decision seem to be that the principal Civil Court only can grant or discharge certificates of administration, and make a person, whose certificate has been revoked, account to his successor; that that Court only can take security from persons to whom certificates of administration are granted; and that in the principal Civil Court, according to the Bombay Act (but not according to Act XL of 1858), the property of the minor is vested. A further

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<sup>1</sup> *Domodardas Maniklal v. Utamaram Maniklal*, 10 Bom H. C. Rep. 414.

<sup>2</sup> *Utamaram Maniklal v. Damoodhardas Maniklal*, 9 Bom. H. C. Rep. 39.

reason for the decision was, that where any Court other than the principal Civil Court is intended to have jurisdiction, it is specially mentioned in the Act, whereas Section 19 of the Bombay Act, which corresponds to Section 19 of Act XL of 1858, does not specially mention the Court in which the action is to be brought. It seems, however, that the fact, that Section 19 does not specify in what Court the action is to be brought, tends rather to show that it can be brought in any Court having jurisdiction to try such suit for an account, if it were brought against a trustee, or manager of an infant's estate, to whom no certificate of administration has been granted. Otherwise, the legislature would have clearly expressed its intention of taking away from all Courts, except the principal Civil Court of the district, the power to try suits brought under Act XL of 1858.

If a minor attains his majority before the final decision of a suit which has been instituted for his benefit under Act XL of 1858, he may continue the prosecution of the suit in his own behalf.<sup>1</sup>

When it be necessary that provision should be made by the Court for the care of the person and property of a minor, to whose estate no certificate of administration can be granted under the provi-

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<sup>1</sup> Act XL of 1858, sec. 20.

sions of Section 7 of the Act, *and*<sup>1</sup> that estate consist in whole or in part of land or interest in land, the Court may direct the Collector to take charge of the estate,<sup>2</sup> and thereupon it becomes the duty of the Collector to appoint a manager of the property of the minor, and a guardian of his person, in the same manner and subject to the same rules in respect of such appointments, and of the duties to be performed by the manager and guardian respectively, so far as the same may be applicable, as if the property and person of the minor were subject to the jurisdiction of the Court of Wards.<sup>3</sup>

Procedura  
when estate  
consists of  
immove-  
able pro-  
perty.

No certificate of administration need apparently be given to the Collector,<sup>4</sup> but all that has to be done is for the Court to direct the Collector to take charge of the estate; and thereupon the management of the minor's estate, and of his maintenance and education, becomes vested in the Collector free from the superintendence, control,<sup>5</sup> or interference<sup>6</sup> of the

<sup>1</sup> See *Bussunt Coomaree Dossee v. The Collector of Jessore*, 13 W. R. 243; *Mussamut Kurrupool Kooer v. The Collector of Shahabad*, 20 W. R. C. R. 432; *Syud Hyder Reza v. The Collector of Purneah*, 22 W. R. C. R. 490. See *ante*, p. 169, note 1.

<sup>2</sup> The Collector can only take charge of the minor's estate. *Rajesuree Debia v. Jogendronath Roy*, 23 W. R. C. R. 278.

<sup>3</sup> Act XL of 1858, sec. 12. See *ante*, Lecture III, as to the management of estates by the Court of Wards.

<sup>4</sup> See, however, *Laksmibai v. Gonesh Antaji*, 4 Bom. H. C. Rep. A. C. J. 130.

<sup>5</sup> See *Ramendro Bhattacharjee v. The Collector of Rajshahye*, 14 W. R. C. R. 113; and *The Collector of Beerbhoom v. Mundakinee Debee*, W. R. 1864, p. 332.

<sup>6</sup> *Rajah Mohessur Roy v. The Collector of Rajshahye*, 16 W. R. C. R. 263.

Civil Courts, but subject to the control of the superior Revenue authorities,<sup>1</sup> that is to say, the Commissioner of his division and the Board of Revenue.

When the Collector is directed by the Civil Court to take charge of the estate of a minor, he must take over the minor's entire estate, moveable as well as immoveable,<sup>2</sup> except such of his property as is not capable of being separately managed.<sup>3</sup>

Powers of Civil Court, when estate of joint proprietors ceases to be subject to the Court of Wards.

As we saw in the last lecture, the jurisdiction of the Court of Wards over estates, which are held by joint proprietors, only continues so long as all such proprietors remain disqualified ; but, whenever one or more of the proprietors of an estate, which has come under the jurisdiction of the Court of Wards on account of the disqualification of all the proprietors, ceases to be disqualified, and the estate in consequence ceases to be subject to the jurisdiction of the Court of Wards, notwithstanding the continued disqualification of one or more of the co-proprietors, the Collector of the district in which the estate is situate may represent the facts to the Civil Court; and the Court, unless it see sufficient reason to the contrary, shall direct the Collector to retain charge of the persons and of the shares of

<sup>1</sup> Act XL of 1858, sec. 15.

<sup>2</sup> *Laksmibai v. Gonesh Antaji*, 4 Bom. H. C. Rep. A. C. J. 129.

<sup>3</sup> See *ante*, p. 150.



the property of the still disqualified proprietors, during the continuance of their disqualification, or until such time as it may be otherwise ordered by the Court.<sup>1</sup>

If the property be situate in more than one district, the representation is to be made by the Collector, who had the general management of the property under the Court of Wards,<sup>2</sup> to the Civil Court of his own district; and the orders of the Court of that district have effect also in other districts in which portions of the property may be situate.<sup>3</sup>

When the Collector has been directed by the Civil Court to retain possession of the persons and properties of still disqualified proprietors, all further proceedings with reference to the minor or his estate must be in accordance with the provisions of the Court of Wards Act,<sup>4</sup> as if such still disqualified proprietors were proprietors of an entire estate. And in case any of the qualified proprietors so consent, the management of the shares of such qualified proprietors may be retained or assumed by the Collector and carried out under the provisions of the Court of Wards Act so long as it may seem fit to the Collector and such qualified proprietors.<sup>5</sup>

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<sup>1</sup> Act XL of 1858, sec. 14.

<sup>2</sup> Act XL of 1858, sec. 14.

<sup>3</sup> See *ante*, Lecture III.

<sup>4</sup> Act IV (B. C.) of 1870.

<sup>5</sup> Act IV (B. C.) of 1870, sec. 3; *ante*, Lecture III.

The Collector, and the manager and guardian appointed by him, would in this case have the same duties and powers as a Collector, manager, and guardian having charge of the estate and person of a minor under the Court of Wards.<sup>1</sup>

The powers  
of a cer-  
tificate-  
holder.

With respect to the powers of a certificate-holder under Act XL of 1858, section 18 of that Act provides that "every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor, if not a minor, and may collect and pay all just claims, debts,<sup>2</sup> and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

The Court cannot, however, summarily set aside a sale or mortgage which has been executed without sanction. It can only be set aside in a regular suit.<sup>3</sup>

It is a question whether section 18 affects the powers of guardians who have not taken out certificates of administration under this Act, and whether their powers of selling, leasing, and mortgaging

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<sup>1</sup> As to what those duties and powers are, see *ante*, Lecture III.

<sup>2</sup> See *ante*, p. 158.

<sup>3</sup> *Mukrumunnissa v. Abdool Jubbar*, 17 W. R. C. R. 171.

the estates of their wards are at all curtailed thereby.<sup>1</sup>

In spite of the large powers given to a certificate-holder, there is, as Mr. Markby points out in his lectures on Indian law,<sup>2</sup> this important feature to remember: "He who deals with the representative of another must know that it is the duty of the representative to act in all things to the best of his ability for the benefit of his principal, and if the circumstances be such that a reasonable man ought to suspect that the representative was not so acting, he is bound to abstain dealing further with the representative, until the suspicion is removed. No one is at liberty to deal with a representative whose conduct he doubts. The party dealing with the representative is not the judge of what is or is not for the benefit of the principal, but he must cease to act as soon as he has reason to believe that the representative is acting improperly. This is a general principle of the law of representation, and applies as much to the certificate-holder representing a minor as to any other representative."

The effect of the 18th section of Act XL of 1858 is to make a sale, or mortgage, or a lease<sup>3</sup> for more than five years, by a certificate-holder without the sanc-

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<sup>1</sup> See *post*, Lecture X.

<sup>2</sup> p. 81.

<sup>3</sup> As to the effect of an unsanctioned lease for more than five years, see *Mahomed Reza v. The Collector of Chittagong*, 15 W. R. G. R. 116.

tion of the Civil Court, invalid,<sup>1</sup> even if the purchaser, mortgagee, or lessee has acted *bonâ fide*, and paid a fair price for the property; but in such a case where possession is ordered to be restored with mesne profits, it should be made contingent on repayment to the purchaser, mortgagee, or lessee of so much of the purchase-money as had been expended for the benefit of the infant or his estate, with interest at a reasonable rate.<sup>2</sup> However, where a certificate-holder mortgaged certain property of a minor without previously obtaining the sanction of the Court under section 18 of Act XL of 1858, but it was found that the mortgage transaction was a proper one, and there had since been a decree in a suit, in which the minor was properly represented, under which the property had been sold, the irregularity as to the mortgage being made without the sanction of the Court was not allowed to prevail.<sup>3</sup> The reason for this was rather, that the Court would not go behind the decree which had been given

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<sup>1</sup> *Brijendronarain Roy v. Bussuntcoomar Ghose*, 13 W. R. C. R. 300; S. C. *In the matter of the Petition of Busuntocoomar Ghose*, 15 B. L. R. note to p. 351; *Jungee Lall v. Sham Lall Misser*, 20 W. R. C. R. 121; *Sorut Chunder Chatterjee v. Ashutosh Chatterjee*, 24 W. R. C. R. 46; S. C. *Shurrut Chunder v. Rajkissen Mooherjee*, 15 B. L. R. 350. See also *the Court of Wards v. Kupulmun Sing*, 10 B. L. R. 364; S. C. 19 W. R. C. R. 164.

<sup>2</sup> *Sorut Chunder Chatterjee v. Ashutosh Chatterjee*, 24 W. R. C. R. 46; S. C. *Shurrut Chunder v. Rajkissen Mooherjee*, 15 B. L. R. 350.

<sup>3</sup> *Alfootoonissa v. Goluck Chunder Sen*, 15 B. L. R. note to p. 353; S. C. 22 W. R. C. R. 77.

in the suit brought by the mortgagee, and under which the property had been sold, than that the sale by the certificate-holder without the sanction of the Court was valid.

A sale or mortgage without the sanction of the Court is not absolutely void. It is voidable at any time thereafter by the infant on coming of age, or on his behalf while he is still a minor, subject however to the infant being required to repay to the purchaser so much of the purchase-money as has been expended for his benefit or for that of his estate.

Every guardian appointed by the Civil Court or <sup>Education of minor.</sup> by the Collector under Act XL of 1858 is bound to provide for the education of the minor in a suitable manner. The general superintendence and control of the education of all minors, of whom guardians have been appointed under the Act, is vested in the Civil Court or in the Collector as the case may be.<sup>1</sup>

Act XL of 1858 provided<sup>2</sup> that the provisions of <sup>Act XXVI of 1854.</sup> Act XXVI of 1854 (*for making better provision for the education of male minors subject to the superintendence of the Court of Wards*) should, so far as was consistent with the provisions of Act XL of 1858, be applicable to the Civil Court or to the

<sup>1</sup> Act XL of 1858, sec. 25. This section, so far as it relates to any guardian appointed under Act IV (B. C.) of 1870, is repealed by sec. 85 of that Act.

<sup>2</sup> Sec. 25.

Collector, as the case might be, in respect to minors, of whom a guardian appointed by the Civil Court or by the Collector in charge. Act XXVI of 1854 was, however, so far as it related to the provinces under the control of the Lieutenant-Governor of Bengal, repealed by the Court of Wards Act.<sup>1</sup>

Recall of  
certificate,  
and remov-  
al of guar-  
dian.

Any friend or relative of an infant, of whose estate a certificate of administration has been granted, or of whose person a guardian may have been appointed by the Court, may apply to the Court which granted the certificate, or appointed the guardian, to revoke such certificate, or remove such guardian, in case he apprehends any danger to the estate, or to the physical or moral welfare, of the minor.<sup>2</sup> Such Court may, for any sufficient cause, recall any certificate granted under Act XL of 1858,<sup>3</sup> even though the certificate-holder be a person entitled under a deed or will to the management of the estate,<sup>4</sup> and the Court may direct the Collector to take charge of the estate, or may grant a certificate to the Public Curator or any other person, as the case may be, and may compel the person whose certificate has been recalled to make over

<sup>1</sup> Act IV (B. C.) of 1870, sec. 86.

<sup>2</sup> *Maharajah Luckee Narain Aung Bheem v. Sooruj Moonee Pdt Mohadye*, 2 W. R. M. A. 6.

<sup>3</sup> Act XL of 1858, sec. 21.

<sup>4</sup> *In the matter of the Petition of Khoja Shurwar Hossein Khan*, B: L. R. F. B. R. 721; *S. C. Nannee Bibee v. Khojah Surwar Hossein*, 7 W. R. C. R. 523, and 2 In. Jur. N. S. 200.

the property in his hands to his successor, and to account to such successor for all monies received and disbursed by him. The Court may also, for sufficient cause, remove any guardian appointed by it.<sup>1</sup>

It is not necessary that the accounts of the certificate-holder should be taken in a regular suit under Section 19 of Act XL of 1858<sup>2</sup> before an application is made to the Civil Court for his removal.<sup>3</sup>

This summary power of removal can only be exercised in the case of managers and guardians who have been appointed by the Civil Court under Act XL of 1858, and the Court cannot summarily remove a guardian who has not been appointed by it,<sup>4</sup> but who is acting either under a testamentary appointment by the father of the infant, or as the infant's natural guardian.

The proper course for a friend of an infant to pursue where a person not appointed as guardian by the Court is managing improperly the infant's estate, or is not making proper provision for its education, is to bring on behalf of the infant a regular suit against such guardian, and on cause

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<sup>1</sup> Act XL of 1858, sec. 21.

<sup>2</sup> See *ante*, p. 172.

<sup>3</sup> *In the matter of the Petition of Khoja Shurwar Hossein Khan*, B. L. R. F. B. 721; S. C. *Nannee Bibee v. Khojah Surwar Hossein*, 7 W. R. C. R. 523 and 2 In. Jur. N. S. 200.

<sup>4</sup> *Mussamut Gourmonee v. Bamasoonderee*, 2 Sev. Reps., note to p. 747; S. C. 16 S. D. A. Reps. 532; *S. M. Lakhiprya Dasi v. Nobin Chandra Nag*, 3 B. L. R. A. J. 37; S. C. 11 W. R. C. R. 370.

shown, the Court trying such suit would interfere by injunction to restrain such guardian from intermeddling with the estate or custody of the infant. The person bringing such a suit would have either to obtain a certificate of administration, or to get the leave of the Court to institute the suit without a certificate.<sup>1</sup>

A certificate-holder, who has been removed by the Court from his trust, cannot be summarily compelled to account to any one but his successor for the monies received and disbursed by him.<sup>2</sup> Neither at the instance of the minor himself after he has attained majority, nor at the instance of any friend or relative of the minor during his minority, can any present or past certificate-holder be summarily compelled to account. Except to his successor in office, by a regular suit only can he be compelled to furnish his accounts.<sup>3</sup>

Grounds  
for revoca-  
tion of cer-  
tificate.

A certificate should not be recalled except upon proof of malversation or misconduct on the part of the certificate-holder, or of a probability of danger arising to the minor's estate, if the property remains under his control.<sup>4</sup> A certificate-

<sup>1</sup> See *ante*, p. 152.

<sup>2</sup> See *Ram Dyal Gooye v. Amritlall Khamaroo*, 9 W. C. R. 555.

<sup>3</sup> *Ramdyal Gooye v. Amritlall Khamaroo*, 9 W. R. C. R. 555; *Doolun Singh v. Torul Narain Singh*, 4 W. R. M. A. 4; *Modhoosoodun Singh v. The Collector of Midnapore*, 1 Marshall, 245; S. C. 2 Hay 113.

<sup>4</sup> See *Rajessurree Debia v. Jogendronath Roy*, 23 W. R. C. R. 279; *Modhoosoodun Singh v. The Collector of Midnapore*, 1 Marshall, 245; S. C. 2 Hay 113.



holder is also liable to be removed, if by reason of mental incapacity, conviction of felony, immorality,<sup>1</sup> or by some other incapacitating cause he has become unfit to manage the property.<sup>2</sup>

The fact that another person would manage the property better can be no ground for the removal of a guardian, as such application would amount to an appeal from the order appointing the manager. A certificate can be recalled only in the case of misconduct, neglect, or incapacitating causes arising subsequent to the grant of the certificate.<sup>3</sup> Releasing without adequate consideration a mortgage in the minor's favour, and lending the minor's money without security,<sup>4</sup> withdrawing without any sufficient cause or justification, and without legal advice, an appeal made to set aside a sale of the minor's estate, and at the same time dealing with the auction-purchaser and obtaining a putnee of that very property in the name of his own wife,<sup>5</sup> have been held to be sufficient causes for the removal of a certificate-holder ; and where the certificate-holder had been

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<sup>1</sup> *Mohomuddy Begum v. Mussamut Oomdutonnessa*, 13 W. R. C. R. 454.

<sup>2</sup> *Modhoosoodun Singh v. The Collector of Midnapore*, 1 Marshall, 245 ; S. C. 2 Hay 113.

<sup>3</sup> *Modhoosoodun Singh v. The Collector of Midnapore*, 1 Marshall, 245 ; S. C. 2 Hay 113 ; and see *Mrs. Anne Kolonas*, 16 S. D. A. 369.

<sup>4</sup> *Tusreef Hossein v. Bibee Sookhoo*, 14 W. R. C. R. 453.

<sup>5</sup> *Petambar Dey Mozoomdar v. Ishan Chunder Dutt Biswas*, 18 W. R. C. R. 169.

guilty of gross negligence, if not of fraud, in wasting the property of the minor by allowing portions to be sold for arrears, and debts of very small amounts, when there was an ample fund in hand to have prevented the sales, his certificate was recalled.<sup>1</sup> Again, where two persons who had received a joint certificate of administration to the estate of a minor, had so quarrelled that there was no possibility of their acting together for the interests of the minor, their certificate was recalled.<sup>2</sup>

The fact that a guardian had executed a bond without the previous sanction of the Court, is not, if he acted in good faith, and without any intention of injuring the interests of the minor, a ground for recalling his certificate, though it would be otherwise where he acted in bad faith.<sup>3</sup> Again it has been held that the marriage of a female minor is not a sufficient reason for taking away a certificate and giving it to the father-in-law of the minor.<sup>4</sup> There must be neglect or a cause of a similar kind.

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<sup>1</sup> *Goonomonee Dassee v. Bhabo Soonduree Dossee*, 18 W. R. C. R. 258.

<sup>2</sup> *Nistarinee Debee v. The Collector of the 24 Pergunnahs*, 23 W. R. C. R. 330.

<sup>3</sup> *Brijendronarain Roy v. Bussuntcoomar Ghose*, 13 W. R. C. R. 300; S. C. *In the matter of the Petition of Bussuntcoomar Ghose*, 15 B. L. R. note to p. 351.

<sup>4</sup> *Mussamut Juggodumba Koer v. Mussamut Mircha Koer*, 17 W. R. C. R. 269.

In order to enforce the delivery of the ac-  
 counts, which can be summarily required, the Civil  
 Court may impose a fine not exceeding five hun-  
 dred rupees on any person who may wilfully  
 neglect or refuse to deliver his accounts, or  
 any property in his hands, within the prescribed  
 time, or a time fixed by the Court; and may  
 realize such fine by attachment and sale of his  
 property under the rules in force for the execution  
 of decrees of Court. The Court may also com-  
 mit the recusant to close custody until he shall  
 consent to deliver such accounts or property.<sup>1</sup>

Means of  
 enforcing  
 delivery of  
 accounts.

A certificate-holder (not being the Public Cura-  
 tor) and any guardian appointed by the Court,  
 may, with the permission of the Court, resign his  
 trust, and the Court may give him a discharge  
 therefrom on his accounting to his successor duly  
 appointed for all monies received and disbursed  
 by him, and making over the property in his  
 hands.<sup>2</sup> A certificate-holder desirous of resigning  
 his trust, cannot be relieved except with the per-  
 mission of the Court,<sup>3</sup> and after a successor has  
 been duly appointed in his place with all the  
 formalities required by Act XL of 1858.<sup>4</sup>

Resigna-  
 tion of  
 trust by  
 certificate-  
 holder.

A Court permitting a certificate-holder to resign,

<sup>1</sup> Act XL of 1858, sec. 22.

<sup>2</sup> Act XL of 1858, sec. 23.

<sup>3</sup> See *Kalee Pershad Singh v. Poorno Debia*, 15 W. R. C. R. 398.

<sup>4</sup> Sec. 6, *ante*, p. 158. See *Mussamut Jogodumba Koer v. Mussamut Mircha Koer*, 17 W. R. C. R. 269.

cannot fine him for neglecting to deliver his accounts to his successor. Until he has rendered his accounts he cannot get a discharge, and therefore retains his office with all its liabilities, and if he is guilty of malversation, or for other good cause, he may be removed from his office under the provisions of Section 21 of Act XL of 1858,<sup>1</sup> in which case he must render his accounts, and deliver up the property in his hands under pain of the penalties imposed by Section 22<sup>2</sup> of the same Act.

Appeals  
from orders  
under Act  
XL of 1858.

All orders passed by the Civil Court or by any subordinate Court under Act XL of 1858 are open to appeal under the rules in force for appeals in miscellaneous cases from the orders of such Court and the subordinate Courts.<sup>3</sup> It is immaterial of what nature the order may be. An appeal equally lies, whether the Court grants or refuses an application made to it.<sup>4</sup>

Any person who had a right to appear on the proceeding,<sup>5</sup> would also have a right to appeal. A friend of the minor is at liberty to appeal on

<sup>1</sup> *Ante*, p. 182.

<sup>2</sup> *Ante*, p. 187.

<sup>3</sup> Act XL of 1858, sec. 28. See *ante*, p. 154, as to an appeal from orders granting or refusing permission to bring a suit without a certificate.

<sup>4</sup> *Mohendronath Mookerjee v. Bamasoonduree Dabea*, 15 W. R. C. R. 493; S. C. *In the matter of the Petition of Mohendronath Mookerjee*, 7 B. L. R. App. 6; *contra*, *Chumutkar Mohinee Dassee v. Raj Rakhhal*, 22 W. R. C. R. 479.

<sup>5</sup> See *ante*, p. 159.

behalf of the minor, against an order made by the Civil Court under Act XL of 1858;<sup>1</sup> but it has been held by a Division Bench<sup>2</sup> of the High Court that the friend of the minor so appealing must either be provided with a certificate of administration, or have obtained the leave of the lower or of the appellate Court.<sup>3</sup> The reasons for this decision are, however, not easy of comprehension. Section 3 of Act XL of 1858 provides that no person shall be entitled to institute or defend any *suit* connected with the estate of which he claims the charge until he shall have obtained a certificate; but proceedings under Act XL of 1858 are neither suits, nor proceedings in the nature of suits, and in no proceedings under Act XL of 1858 can the minor be represented by a certificate-holder, as some of those proceedings are preliminary to the grant of a certificate, and in the others the interests of the minor are adverse to those of the certificate-holder. The Act apparently contemplates the infant being represented in such proceedings in the ordinary way by a next friend or guardian *ad litem*, and no special permission is requisite to entitle a friend to represent the minor.

It has been held that there is only one appeal

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<sup>1</sup> *Sheo Purshun Chobey v. The Collector of Sarun*, 13 W. R. C. R. 256.

<sup>2</sup> *Loch and Dwarkanath Mitter*, J J.

<sup>3</sup> *Sheoburrut Singh v. Lalljee Chowdry*, 13 W. R. C. R. 202.

from orders under Act XL of 1858, namely to the High Court, and that there is no further appeal to the Privy Council, as such orders do not bear an appealable value.<sup>1</sup>

Powers of  
Civil  
Courts  
apart from  
Act XL of  
1858 to  
appoint  
guardians.

It is not easy to say what powers, if any, apart from those given to them by Act XL of 1858, are possessed by the Mofussil Civil Courts with reference to the appointment of guardians.

Act XL of 1858 was apparently intended to codify the procedure with reference to the appointment of guardians by the District Courts, and therefore it can scarcely be, that an appointment of a guardian of the person or estate of an infant can be made, except in the manner prescribed by Act XL of 1858.

The Mofussil Civil Courts must, in cases not governed by Hindu and Mahomedan law, and to which no Act or Regulation of Government is applicable, proceed according to justice, equity, and good conscience.<sup>2</sup> It may therefore be that the District Courts have power to appoint guardians in cases, in which Act XL of 1858 affords no remedy.<sup>3</sup>

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<sup>1</sup> *Mussamut Pearee Daye v. Hurbuns Kooer*, 14 W. R. C. R. 299; and see High Court Charter, 1865, cl. 39. Though there is no right of appeal, special leave to appeal can be given by the Privy Council, see *In the matter of Victoria Skinner*, 13 Moo. I. A. 532.

<sup>2</sup> See Tagore Law Lectures for 1872, p. 225.

<sup>3</sup> For an instance of an appointment of a guardian by the Civil Court in a suit before Act XL of 1858 was passed, see *Mussamut Muhtaboo v. Gunesh Lal*, 10 S. D. A., 329.

## LECTURE V.

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### APPOINTMENT OF GUARDIANS BY THE HIGH COURT.

IN the last lecture we considered the powers possessed by District Courts in Bengal with respect to the appointment of guardians of the persons and estates of minors. We have to consider in the present lecture the powers possessed by the High Court with respect to the appointment of guardians of infants subject to its jurisdiction.

By its Charter of 1774, the Supreme Court <sup>The Supreme Court.</sup> was empowered<sup>1</sup> to appoint guardians and keepers for infants and their estates, according to the order and course observed in England.

By the Letters Patent of 1865<sup>2</sup> the High Court <sup>The powers of the High Court.</sup> possesses the like power and authority with respect to the persons and estates of infants within the Bengal Division of the Presidency of Fort William, as was vested in the Supreme Court at the date of the establishment of the High Court.

It is not very easy to see what is the exact extent of this jurisdiction with respect to the persons and estates of infants, given to the High Court by its Charter of 1865, as neither the High Court

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<sup>1</sup> cl. 25.

<sup>2</sup> cl. 17. See Letters Patent of 1862, cl. 16.

Charter, nor the Charter of the Supreme Court, determines the territorial limits of this jurisdiction.

European  
British  
subjects.

In a case<sup>1</sup> decided by a Division Bench<sup>2</sup> of the High Court of the North-Western Provinces, where a father presented a petition to a Zillah Judge under Act IX of 1861,<sup>3</sup> claiming the possession and custody of his two minor children alleged to be detained by their mother, the parties being European British subjects, the Court, after considering some of the provisions of Act IX of 1861, said: "The seventh section contains a saving of certain laws in the following words:—'Nothing in this Act shall be taken to interfere with the jurisdiction exercised under the laws in force by any Supreme Court of Judicature or the Court of Wards, or under Act XL of 1858 (for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal).' The laws thus mentioned provide for the care of the persons and property of two classes of persons, *viz.*, minors who are, and minors who are not, European British subjects. For the latter class, Act XL of 1858 had to some extent made provision. For the former (though not for them alone) the Charter of the Supreme Court<sup>4</sup> had empowered that Court to 'appoint guardians and keepers for infants and their estates

<sup>1</sup> *Shannon*, 2 N. W. P. Rep. 79. See *post*, Lecture VI.

<sup>2</sup> *Morgan*, C. J., and *Ross*, J.

<sup>3</sup> See *post*, Lecture VI.

<sup>4</sup> Sec. 25.



according to the order and course observed in that part of Great Britain called England.' And the Supreme Court exercised jurisdiction in the case of minors, not merely by virtue of the special authority for the appointment of guardians conferred by this section of the Charter, but also under its general powers. In the case, for instance, of a father who, as the natural guardian of his minor children and entitled to the custody of them, applied to the Supreme Court for its aid to obtain possession of his children, that Court, in the exercise of its undoubted powers, interfered, and afforded adequate assistance in order to the enforcement of the rights of the father."

The effect of this case is to show that the High Court can appoint guardians of infants who are European British subjects, although those infants are residing outside of, and have no property within, the limits of its ordinary original civil jurisdiction.

The jurisdiction over infants given to the High Court by clause 17 of its Charter is irrespective of nationality; and, if the High Court has power to appoint guardians of European British minors outside the limits of its ordinary original jurisdiction, it has such power with respect to minors who are not European British subjects.

If the High Court cannot appoint guardians of European British minors residing outside its ordinary

original jurisdiction, it is very doubtful whether any District Court can appoint such guardians. It might be argued that they can, on the grounds that by Act VIII of 1859<sup>1</sup> the Civil Courts can take cognizance of all suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament or Indian Act or Regulation; and also that they are bound to proceed according to justice, equity, and good conscience.

We have seen in a former lecture<sup>2</sup> that persons who are subject to the jurisdiction, as respects infants, of a High Court, are exempt from the jurisdiction of the Court of Wards. Therefore, if the High Court has jurisdiction over infants outside the limits of its ordinary original jurisdiction, the Court of Wards Act has left the Court of Wards without any person upon whom to exercise its jurisdiction. If this be so, the result is that every time the Court of Wards takes possession of a minor's estate it is acting illegally, and is a mere trespasser. It seems, however, that in practice the Supreme Court Charter has not been treated as giving the High Court power to appoint guardians of minors, other than European British subjects, living outside the limits of its ordinary original jurisdiction.

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<sup>1</sup> Sec. 1. See the New Civil Procedure Code, Act X of 1877, sec. 11.

<sup>2</sup> Lecture III, *ante*.

Thus the position of the High Court and the District Courts in Bengal seems to be this,—namely, that throughout Bengal the only Court, having jurisdiction to appoint guardians of the persons and estates of European British subjects, is the High Court ; that within the town of Calcutta the High Court monopolises the power to appoint such guardians in respect of persons belonging to every race and creed; and that outside Calcutta the District Courts, acting under the powers conferred upon them by Act XL of 1858<sup>1</sup> and Act IX of 1861,<sup>2</sup> can appoint guardians of persons not being European British subjects, it being a question whether the High Court has not also power to appoint guardians to such persons outside Calcutta.

Powers of  
High Court  
and Dis-  
trict Courts  
disting-  
guished.

In addition to the special powers of appointing guardians to infants given to the High Court by its Charter,<sup>3</sup> that Court, within the limits of its ordinary original civil jurisdiction, can, acting as a Court of equity,<sup>4</sup> appoint and remove guardians, provide for the maintenance of infants, the management and disposition of their property, and their marriage.

Powers of  
High Court

The law and procedure which guide the High Court in appointing guardians to infants differ but

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<sup>1</sup> See *ante*, Lecture IV.

<sup>2</sup> See *post*, Lecture VI.

<sup>3</sup> cl. 17.

<sup>4</sup> See High Court Charter of 1865, cl. 19; High Court Charter of 1862, cl. 18.

little from those which guide the English High Court of Chancery in like cases.<sup>1</sup>

When  
Court will  
appoint  
guardian.

Whenever an infant has no legal guardian, or his legal guardian is unable, unfit, or unwilling to act efficiently and to the advantage of the infant, the High Court will constitute him a ward of Court, and appoint a guardian of his person and estate.

Jurisdic-  
tion inde-  
pendent  
of posses-  
sion of  
property by  
infant.

Although the possession of property by the infant is not necessary for the purpose of giving jurisdiction to the Court,<sup>2</sup> the absence of property prevents the Court from exercising its jurisdiction in most cases. In fact, a case where the Court can be called upon to interfere can scarcely occur unless the infant is possessed of some property.<sup>3</sup> In *Wellesley v. The Duke of Beaufort*,<sup>4</sup> Lord Chancellor Eldon said:—"With respect to the doctrine that this authority belongs to the king as *parens patriæ*, exercising a jurisdiction by this Court, it has been observed at the Bar that the Court has not exercised that jurisdiction, unless where there was property belonging to the infant to be taken care of in this Court. Now, whether that be an accurate view of the law or not, whether it is founded on what Lord

<sup>1</sup> As to the laws which the High Court is bound to administer, see High Court Charter of 1865, cl. 19; High Court Charter of 1862, cl. 18; and Morley's Digest, Vol. I, p. 22 of the Introduction.

<sup>2</sup> *Re Fynn*, 2 D. G. & S. 481; *Re Spence*, 2 Ph. 247; *Wellesley v. Beaufort*, 2 Russ. 21.

<sup>3</sup> See Daniell's Chancery Practice, 5th ed., p. 1191.

<sup>4</sup> 2 Russ. 20.

Hardwicke says in the case of *Butler v. Freeman*,<sup>1</sup> 'that there must be a suit depending relative to the infant or his estate' (applying, however, the latter words rather to what the Court is to do with respect to the maintenance of infants), or whether it arises out of a necessity of another kind,—namely, that the Court must have property in order to exercise this jurisdiction, that is a question to which, perhaps, sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this Court has not the means of acting except when it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only when it has the means of doing so;—that is to say, by its having the means of applying property for the use and maintenance of the infants. That such has been the doctrine of this Court for a long series of years, no one can deny."

Where, however, the infant is not possessed of any property, persons desirous of obtaining the assistance of the Court in aid of the infant<sup>2</sup> may attain their end by settling a small sum of money on the infant, or constituting themselves or other

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<sup>1</sup> 1 Ambler, 303.

<sup>2</sup> Macpherson on Infants, p. 104.

persons trustees of such sum for the infant.<sup>1</sup> In England £100 is considered sufficient for this purpose. A suit can then be instituted for the administration of this trust,<sup>2</sup> and the infant thereby becomes a ward of the Court, and a guardian of his person can be appointed. This manner of obtaining the assistance of the Court is particularly useful where the father of an infant, who is possessed of no property independently of his father, finds a difficulty in enforcing his parental right to the custody of his child. In *Todd v. Todd*,<sup>3</sup> a young man of seventeen was persuaded by Lynes, who was the head of a religious brotherhood, to leave his father, and join Lynes' monastery. The father made himself a trustee of £100 for the infant, and filed a bill to make his son a ward of Court. He then applied for and obtained an order restraining Lynes from inducing, encouraging, or permitting the infant to take any monastic vows, and compelling Lynes to deliver him into the custody of his father.

Not necessary that property of infant should be within jurisdiction.

Although property is necessary to give to the Court the means of exercising its jurisdiction, there is no doubt that the Court can appoint guardians of infants not domiciled, and having no property,

<sup>1</sup> *Todd v. Todd*, V. C. Malins, 25th July, 1873; *Re Lyons*, 22 L. T. N. S. 770.

<sup>2</sup> An application can also be made by petition without a suit. See *post*, p. 200.

<sup>3</sup> V. C. Malins, 25th July, 1873, cited as *Todd v. Lynes* in Simpson on Infants, p. 134.

in this country. In one case, where the infant was domiciled in Scotland, and had a guardian and tutor there, and was in England solely for the purpose of his education, it was held that he was liable to be made a ward in Chancery upon a bill filed in England, although the whole of his property was in fact in Scotland, and under the power of the guardian or tutor there.<sup>1</sup>

The Court will not, however, appoint as sole guardian a person resident outside its jurisdiction,<sup>2</sup> but, where the property of the infant is within the jurisdiction, and the infant is not in the jurisdiction, a person resident within the jurisdiction may be appointed guardian *pro tanto* to receive and remit the money allowed for the infant's maintenance.<sup>3</sup>

The manner in which the High Court can appoint guardians of the persons and estates of infants is, as we have seen above,<sup>4</sup> regulated by the practice of the English Court of Chancery at the date of the institution of the Supreme Court, subject however to such alterations as may be made by legislative enactments, or by the rules of the High Court itself.

Procedure  
in appoint-  
ment of  
guardians.

The High Court can appoint guardians of the persons and estates of infants subject to its juris-

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<sup>1</sup> *Johnstone v. Beattie*, 10 Cl. & Fin. 42.

<sup>2</sup> See *Logan v. Fairlee*, Jac. 193.

<sup>3</sup> *Coverdale v. Greenway*, Bignell 11.

<sup>4</sup> *Ante*, p. 191.

diction, whether there be or be not a suit pending with respect to such infants or to their property.<sup>1</sup>

Applica-  
tion to be  
by petition.

All applications for the appointment of a guardian must be made to the High Court by a petition.<sup>2</sup> If there be a suit pending with respect to the infant or his property, the petition should be made in the suit.

There have not been many instances of the appointment of guardians by the High Court by a petition without a suit. The High Court has undoubtedly possessed the power of so doing since its foundation, but there seems to have been no reported instance of the exercise of that power until the case of *In the matter of Bittan*, decided by Macpherson, J., on the 3rd of May, 1877.<sup>3</sup> In some cases however the Court would not appoint a guardian without a suit being instituted, as for instance where the infant's property is large and there are any difficulties in the administration of his property, or the care of his person, or where the legal guardians of the infant are guilty of misconduct, and ought to be superseded or controlled.<sup>4</sup>

In most cases a suit is unnecessary, and a

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<sup>1</sup> See *In the matter of Bittan*, 2 I. L. R. C. S. 357; and *In the matter of Syedunnissa*, decided by White, J., on the Original Side of the High Court, September 29th, 1877.

<sup>2</sup> Smoult and Ryan's Rules and Orders, p. 130.

<sup>3</sup> 2 I. L. R. C. S. 357. Followed by White, J., *In the matter of Syedunnissa*, September 29th, 1877.

<sup>4</sup> Simpson on Infants, p. 224.



petition without suit will be sufficient, as where the appointment of a guardian is the only thing required, or where the property of the infant is of small amount, or where the testamentary guardian has disclaimed. A petition will also be sufficient where it is wished to supersede a testamentary guardian who has acted in the trust, but who consents to be removed.<sup>1</sup>

Where all that is required is the appointment of a guardian of the infant's person, a petition without suit will generally be sufficient, however large the infant's property may be;<sup>2</sup> but where it is necessary to appoint a guardian of the infant's estate, a suit will generally be required; and even where a guardian of the person of the infant has been appointed, the Court will, if there is no suit, stay payment of maintenance until a suit be brought, except in very special cases, as where there is a specific fund for maintenance or the property is very small.<sup>3</sup>

The petition for the appointment of a guardian of <sup>Contents</sup> the person or estate of an infant must state the age of the infant, the nature and amount of his property, what relations he has by the father's and mother's side, and the degree of relationship between the proposed guardian and the infant.<sup>4</sup>

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<sup>1</sup> *Re Maccullochs*, 6 Ir. Eq. 393.

<sup>2</sup> *Re Duke of Newcastle*, 15 Ves. 447, note (b); Daniell's Chancery Practice, 5th edition, p. 1192.

<sup>3</sup> *Ex parte Mountford*, 15 Ves. 445.

<sup>4</sup> Smoult and Ryan's Rules and Orders, p. 130.

The old practice of the Supreme Court was to require the Master to report as to what person should be appointed guardian of the infant, and the Master in his report was required to state the age of the infant, the nature and amount of his property, what relations he had by the father's or mother's side, the degree of relationship between the proposed guardian and the infant, and the grounds upon which he approved or disapproved of any person so applying. Now that the duties of the Master are merged in the Court, the appointment may be made on the petition, or the Court may make a reference to one of its officers, or to the Court itself, to enquire who is a proper guardian for the infant.<sup>1</sup>

Service of  
petition.

There seems to be no express rule of the High Court as to the class of persons upon whom the petition should be served. The rule of the Court of Chancery is, that the summons, which answers in this respect to the petition to the High Court, should be served upon all the persons who stand within the same degree of relationship to the infant as the proposed guardians, unless their acquiescence in the appointment of the proposed guardian be otherwise proved or service on them is dispensed with.<sup>2</sup>

Evidence  
required.

In addition to evidence of the facts, which must,

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<sup>1</sup> See *In the matter of Bittan*, 2 I. L. R. C. S. 357, followed *In the matter of Syedunnissa*, ante, p. 200 note 1.

<sup>2</sup> Daniell's Chancery Practice, 5th edition, p. 1195.

as we have seen above, be stated in the petition, evidence is required of the fitness of the proposed guardian, and his willingness to act should be proved by the production of his written consent.<sup>1</sup>

A guardian can also be appointed by a decree in a suit, or on a reference made by a decree in a suit.

When the father or other relation first entitled to the custody of the infant's person<sup>2</sup> — as the mother in the case of Mahomedan infant—is living, the Court will not, unless very strong cause be shown, interfere with such custody, or appoint any one else to be guardian of the infant's person.

Mr. Story, in his work on Equity Jurisprudence,<sup>3</sup> observes, that “although in general parents are entrusted with the custody and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion, and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy or low and gross

Right of  
father to be  
appointed  
guardian of  
his infant  
children.

How such  
right may  
be lost.

<sup>1</sup> See Daniell's Chancery Practice, 5th edition, p. 1195.

<sup>2</sup> As to the persons entitled to the right of guardianship of an infant, see *ante*, Lecture II.

<sup>3</sup> § 1341.

debauchery, or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and to superintend their education."

Where the father indulges openly in habits of profligacy and adultery<sup>1</sup> or deliberately teaches his children to swear and use all kinds of low language,<sup>2</sup> has been guilty of an unnatural crime,<sup>3</sup> or has criminally assaulted his daughter,<sup>4</sup> the Court has removed his infant children from his custody. Cruelty to his wife, combined with general bad character,<sup>5</sup> constant habits of drunkenness and blasphemy, poisoning the minds of his children,<sup>6</sup> cruelty to them,<sup>7</sup> have all been held to be grounds for the interference of the Court.

Even less danger to the child than the above

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<sup>1</sup> See *Warde v. Ward*, 2 Phill. 791.

<sup>2</sup> *Wellesley v. Beaufort*, 2 Russ. 1; 2 Bli. N. S. 124; *Mytton v. Holyoake*, Macpherson on Infants, p. 149.

<sup>3</sup> *Anonymous*, 2 Sim. N. S. 54.

<sup>4</sup> *Swift v. Swift*, 11 Jur. N. S. 148, 458; S. C. 34 Beav. 266, and 34 L. J. Ch. 209.

<sup>5</sup> *Ex parte Warner*, 4 B. C. C. 101.

<sup>6</sup> Case cited by Lord Eldon in *De Manneville v. De Manneville* 10 Ves. 61.

<sup>7</sup> *Witfield v. Holes*, 12 Vesey 492.

circumstances, provided it be shown that it is essential to the safety or welfare of the child that the father's rights should be interfered with, has been considered sufficient to justify the removal of a parent from the guardianship of his infant children, as where he was a man of very irregular habits, and had been in prison for debt,<sup>1</sup> or was a man of a dissipated and worthless character, and had married a servant.<sup>2</sup>

But before the Court can interfere there must be a distinct danger of the child being injured, or contaminated by remaining in the custody of its father. The Court will draw a distinction between harshness and cruelty, and will interfere in the latter case only. Occasional acts of severity are insufficient to justify interference. There must be a persistent and continuous course of ill-treatment.<sup>3</sup> The fact that the father is living in adultery would also be insufficient, where he is careful not to bring his children into any contact with his mistress.<sup>4</sup>

Where on the death of the father the mother has the custody of her infant children, she may be removed by the Court on the ground of misconduct,<sup>5</sup> or unfitness.<sup>6</sup>

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<sup>1</sup> *Re Fynn*, 2 D. G. & S. 457.

<sup>2</sup> *In re Cormicks*, 2 Ir. Eq. R. 264.

<sup>3</sup> *Curtis v. Curtis*, 5 Jur. N. S. 1147.

<sup>4</sup> *R. v. Greenhill*, 4 A. & E. 624; *Ball v. Ball*, 2 Sim. 35.

<sup>5</sup> See *Roach v. Garvan*, 1 Ves. Sen. 158.

<sup>6</sup> See *Heynsham v. Heynsham*, 1 Cox. 179.

Religious  
education  
of infants.

The Court will not interfere with the custody of children by the father on account of his religious principles, nor will it interfere with the religious education of children by their father; but after the father's death the Court will, in many cases, interfere with the mode of religious education adopted by the mother or other guardian. According to law a father has a right to have his children brought up in his own religion, both during his life time and after his death.<sup>1</sup> This principle has, for a long time, been recognised by the English Courts;<sup>2</sup> and in *Skinner v Orde*,<sup>3</sup> where the father of the infant was a Christian, and the mother after the death of the father became a Mahomedan, and was bringing up the child in the Mahomedan faith, the Privy Council upheld the order of the High Court at Allahabad removing the child from the guardianship of the mother under the provisions of Acts XL of 1858 and IX of 1861, and placing her under a Christian guardian.

In that case the Privy Council in their judgment said—"The course of decisions in the English

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<sup>1</sup> See *In the matter of Himnath Bose*, 1 Hyde 111; *The Queen v. Vaughan*, 5 B. L. R. 418:

<sup>2</sup> *Talbot v. Shrewsbury*, 4 M. & C. 672; *Re Newberry*, L. R. 1 Eq. 431; *ibid*, 1 Ch. 263; *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, and other cases cited in Simpson on the Law of Infants, p. 120, notes *f* and *g*.

<sup>3</sup> L. R. 4 P. C. 60; S. C. 10 B. L. R. 125, and 14 Moo. I. A. 309. The decision of the High Court at Allahabad in this case is reported in 2 N. W. P. Reps., p. 275.

and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that, in the matter of religious education, great and, in the absence of controlling circumstances, paramount weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children. However this may be, their Lordships do not think it desirable, for the determination of this case, to refer to or rely on any such rule. The Indian Act<sup>1</sup> certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the infant, and no other power or duty. In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government; while Brahman and Buddhist, Christian and Mahomedan, Parsee and Sikh are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having

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<sup>1</sup> IX of 1861.

distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property, are all different, depending in each case on the body to which the individual is deemed to belong : and the difference of religion pervades and governs all domestic usages and social relations. From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social status; and it is therefore ordinarily, and in the absence of controlling circumstances, the duty of the guardian to train his infant ward in such religion."

This rule is applicable whether or not the father has left any directions as to the religious education of his minor children.<sup>1</sup>

Where the parents of the child are not of the same religion, the mother cannot, after the death of the father, even where he has left no directions on the subject, educate the infant in her own religion. She may have charge of them, but she is bound to bring them up in their father's religion.<sup>2</sup> This rule, it is true, would, in many cases, create a barrier between a widowed mother and her infant child ; but apart from the right of the father to control the religious education of his infant children,

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<sup>1</sup> *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539.

<sup>2</sup> See Simpson on the Law of Infants, p. 122.



it is manifestly for the benefit of infants that they should not, on the death of their fathers, be liable to a change of religion as a result of the change of guardianship.

The right of the father to control the religious education of his infant children is one given to him by the law not for his own benefit, but for that of his children. He cannot, therefore, release such right or bind himself to execute it in a particular way.<sup>1</sup>

Right cannot be released.

This rule has been held even to extend to an agreement made with respect to the religious education of their children by the father and mother before marriage, even though the marriage, but for such agreement, would not have taken place.<sup>2</sup> Such ante-nuptial agreements are, however, very common in England in the case of marriages between persons of different religions ; and they are, after the death of the father, often of utility to the Court in determining whether the father's rights have been lost by waiver.<sup>2</sup>

Ante-nuptial agreements.

In some cases the father has been held to have waived by his conduct before his death his right that his children after his death shall be brought up in his religion, and under certain circumstances a father, during his lifetime, loses by waiver that right ; but in the latter event the

Waiver of right.

<sup>1</sup> *Andrews v. Salt*, L. R. 8 Ch. 636.

<sup>2</sup> See *Andrews v. Salt*, L. R. 8 Ch. 622.

Court would require very much stronger evidence of the waiver than in the former.

There is no distinct rule to be laid down as to what kind of conduct constitutes a waiver on the part of the father,<sup>1</sup> but it may be laid down broadly that when a father has, during his lifetime, for some time permitted his children to be brought up in a religion differing from his own, it would, in questions arising after his death with respect to their religious education, be held that he had waived his right to have them brought up after his death in his own religion.

In *Hill v. Hill*,<sup>2</sup> where a Roman Catholic father (who lived till his eldest child was seven years old) allowed the mother, who was a Protestant, to have the exclusive charge of the education of the children during his life, and they were with his full knowledge brought up in the Protestant faith, Vice-Chancellor Wood held that he had abdicated his right to direct the religious education of his children; and in ordering a scheme to be settled for their education, disregarded a direction in his will that they should be brought up in the Roman Catholic faith. In this case the will was in reality the only evidence of the father's desire, and he had by his acts during his lifetime abundantly shown a relinquishment of the religious education of the children to their mother.

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<sup>1</sup> See Simpson on the Law of Infants, p. 122.

<sup>2</sup> 31 L. J. Ch. 505; 8 Jur. N. S. 609.

The cases seem to show that, where the father has allowed his children to be educated in a particular religion sufficiently long for them to have imbibed the principles of that religion, it may, after his death, be assumed that he intended to waive his rights in respect of their religious education.

This principle may be carried to some, though not nearly to the same, extent during the lifetime of the father. In *Lyons v. Blenkin*<sup>1</sup> Lord Eldon said, that the only case in which the Court could interfere with the father's rights in respect of the religious education of his infant children was, where he had permitted them to be brought up by other persons of a particular persuasion, so as to make it difficult for the Court not to see that the happiness of the children must be affected, if interrupted in the course of their education in those principles, and that their father would be the author of that suffering to them.

Where the father or other guardian changes his religion, he does not lose his right to the custody of the infant; but if the infant had been educated in his father's former religion sufficiently long enough to have imbibed the principles of that religion, the father or other guardian would, by changing his religion, lose the control of the religious education of the infant.

Effect of  
change of  
religion by  
guardian.

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<sup>1</sup> Jac. 260.

Act XXI  
of 1850.

Act XXI of 1850 provides that "so much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories." A right of guardianship has been held to be a *right* within the meaning of this Act;<sup>1</sup> but this Act has not made any alteration in the law with respect to the religious education of infants.

Although the Court will not interfere with the custody of children by the father on account of his religious principles, the English Court of Chancery considers the absence of all religious principles as a good ground for interference, and where the father's religious principles are such as to justify in his mind and to cause him to represent to others as moral and worthy of recommendation, conduct which other persons would consider immoral, or when the father by his opinions and conduct demonstrates that he must and does deem it a matter of duty, which his principles impose upon him,

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<sup>1</sup> *Muchoo v. Arzoan Sahoo*, 5 W. R. C. R. 235.

to recommend to his children that conduct in some of the most important relations of life as moral and virtuous, which the law considers as immoral and vicious,<sup>1</sup> then the Court of Chancery would interfere. Speculative religious opinions are not any ground for interference, unless they are such as the law considers dangerous to society.<sup>2</sup>

It is, however, difficult to say to what extent the High Court would interfere in cases where the father's religious opinions are such as would, if he had lived in England, have justified his removal by the Court of Chancery. Probably the Court would consider itself bound to interfere; but would make such allowance as the customs, habits, and opinions of the inhabitants of this country might require to be made.

It may also happen that, apart from questions of religious education, the father's conduct may be such as to amount to a waiver of his right to the care and custody of his children.<sup>3</sup> The principle of these cases is similar to that of the cases above mentioned, *viz.*, that when a father has for some time acquiesced in a certain course of education

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<sup>1</sup> *Shelley v. Westbrooke*, Jac. 266, n.; *Thomas v. Roberts*, 3 D. G. & S. 758.

<sup>2</sup> See *Lyons v. Blenkin*, Jac. 256.

<sup>3</sup> See *Modhoosoodum Mookerjee v. Jadubchunder Banerjee*, 3 W. R. C. R. 194.

for his infant children, he cannot arbitrarily or capriciously alter that course.<sup>1</sup>

The direction of his children's education is, apart from special circumstances, in the hands of the father alone, and the fact of his insolvency or poverty will not, provided he be of good character, deprive him of such right, even when the infants would, on account of a special provision or fund for their benefit, obtain greater pecuniary advantages, and a better education by the custody of them being entrusted to a person other than their father.<sup>2</sup> In *Ex parte Hopkins*,<sup>3</sup> Lord Chancellor King said,—“The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature, and it cannot be conceived that because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me—that of being their guardian.” But if the father has once permitted to his children the advantages of a special fund provided for their education and support, he cannot afterwards prevent their receiving the benefits of that fund.<sup>4</sup> In one case<sup>5</sup> where a sum of money was

<sup>1</sup> See *Lyons v. Blenkin*, Jac. 245; *Powel v. Cleaver*, 2 Bro. C. C. 499; and cases collected in Simpson on the Law of Infants, p. 142, note (w).

<sup>2</sup> *Kilpatrick v. Kilpatrick*, Reg. Lib. 1828, A, fol. 2106. Macpherson on the Law of Infants, p. 142.

<sup>3</sup> 3 P. Wms. 154.

<sup>4</sup> See *Lyons v. Blenkin*, Jac. 245.

<sup>5</sup> *Colston v. Morris*, Jac. 257 n.

left to an infant with a direction that its education should be committed to trustees, and a legacy was also left to the father on condition of his not interfering in it, and the father had accepted the legacy to him, he was required to enter into an undertaking not to interfere with the education. If he had not accepted the legacy, the Court could not have forced him to accept its conditions.

An agreement by the father to give up entirely the custody and control of his children to their mother is against the policy of the English law,<sup>1</sup> unless the father be by such agreement doing only what the law would compel him to do,<sup>2</sup> as where he has been guilty of gross misconduct, or there is danger of moral contamination to the child if it remains with him; also where the father has permitted the mother or some other person to educate and have the custody of the child without himself interfering with its education.

The father can at any time rescind an agreement made with persons other than the mother to give up to them the custody of his infant children,<sup>3</sup> provided that it has not been so acted upon that a revocation of it would injuriously affect the child.

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<sup>1</sup> See *Hope v. Hope*, 8 D. M. & G. 731; and *St. John v. St. John*, 11 Ves. 531.

<sup>2</sup> See *Swift v. Swift*, 11 Jur. N. S. 148 and 458; S. C. 34 Beav. 266, and 34 L. J. Ch. 209.

<sup>3</sup> *Hill v. Gomme*, 1 Beav. 541; S. C. on appeal, 5 M. & C. 250.

The principles upon which the Court removes the father from the guardianship of his infant children apply with greater force to the case of other guardians of an infant.

The Court has complete discretion with respect to the appointment of guardians; but where there are testamentary guardians<sup>1</sup> the Court will not appoint others, unless they have been guilty of improper conduct.<sup>2</sup> The Court will generally appoint as guardian the person who is entitled to act as such in the absence of an appointment by the Court; but good character and capacity for the trust are indispensable qualifications for the appointment.<sup>3</sup>

In some cases the Court will, instead of removing the existing guardian, and appointing a person to act in his place, make orders regulating the conduct of the guardian,<sup>4</sup> and this is the proper course where the conduct of the guardian, though in some sense blameworthy, has not been sufficiently bad to justify his removal from the trust.

Security to  
be given by  
guardian.

A person appointed by the High Court guardian of the estate of an infant must give security for the due performance of his trust;<sup>5</sup> but security will

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<sup>1</sup> As to the appointment of testamentary guardians, see *ante*, Lecture II.

<sup>2</sup> See *Beattie v. Johnstone*, 1 Ph. 30.

<sup>3</sup> The Court will recognize guardians of foreign infants, who have been appointed by Courts of competent jurisdiction in their own country. *Nugent v. Vetzera*, L. R. 2 Eq. 704.

<sup>4</sup> *Roach v. Garvan*, 1 Ves. Sen., 160.

<sup>5</sup> See Smoult and Ryan's Rules and Orders, p. 130.



rarely be required from a guardian of the person of the infant.

When a guardian of the person or estate of an infant has been appointed by the Court, the infant is said to be a ward of Court, and as such is entitled to the particular care and protection of the Court. Properly speaking a ward of the Court is a person who is under a guardian appointed by the Court ; but whenever a suit is instituted in the the Court relative to the person or property of an infant, although he is not under any general guardian appointed by the Court, he is treated as a ward of the Court and as being under its special cognizance and protection.<sup>1</sup>

Infant how  
constituted  
a ward of  
Court.

An order for the maintenance of an infant would also, it seems, constitute the infant a ward of Court.<sup>2</sup> It would also probably be held that a payment into Court of monies belonging to a minor under the provisions of Section 46 of the Indian Trustee Act,<sup>3</sup> would constitute such minor a ward of the Court.<sup>4</sup>

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<sup>1</sup> Story's Equity Jurisprudence, § 1352 ; *Pendleton v. Mackrory*, 2 Dick 736 ; *Gynn v. Gilbard*, 1 Dr. & Sm. 356 ; *Stuart v. Bute*, 9 H. L. C. 440 ; *Hughes v. Science*, Amb. 302. See also Macpherson on Infants, p. 104.

<sup>2</sup> *Re Graham*, L. R. 10 Eq. 530.

<sup>3</sup> XXVII of 1866

<sup>4</sup> See cases under the Trustee Relief Act, cited in Simpson on the Law of Infants, p. 223, note (s).

## LECTURE VI.

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### SUMMARY POWERS POSSESSED BY THE COURTS IN BENGAL WITH REFERENCE TO THE CUSTODY OF INFANTS.

As we have seen in the two preceding lectures, the powers possessed by the Civil Courts in the mofussil of Bengal, and by the High Court, to appoint guardians of infants can only be exercised when the infant is possessed of property. The Courts, however, possess certain summary powers with reference to the disposal of the custody of infants. These powers can be exercised independently of the possession of property by the infant. In the case of infants possessing no property, the exercise of these powers affords the only means of preventing improper custodians retaining the custody of their persons, while, in the case of infants possessed of property, these powers afford a remedy against the danger, which is often attendant upon the delay of protracted proceedings for the appointment of a guardian.

The summary powers of the District Courts in the mofussil, and those of the High Court at Calcutta, are distinct, and are guided by different procedures.

The powers of the mofussil Courts are regulated by Act IX of 1861, which came into force on the 24th of April, 1861, and provides a new and ready procedure for enforcing the right of guardianship to the persons of minors, and for preventing danger to minors by their remaining in improper custody.

Summary powers of Civil Courts in the Mofussil. Act IX of 1861.

That Act does not interfere<sup>1</sup> with the jurisdiction exercised by the High Court,<sup>2</sup> by the Court of Wards,<sup>3</sup> or by the Civil Courts acting under Act XL of 1858.<sup>4</sup>

It has been held that Act IX of 1861 has no application to European British subjects, and that the High Court alone can appoint guardians or provide for the custody of minors coming under that denomination. In *Shannon's case*,<sup>5</sup> where the father presented a petition to a Zillah Judge under Act IX of 1861, claiming the possession and custody of his two minor children, alleged to be detained by their mother, the parties being European British subjects, the High Court of the North-Western Provinces, after pointing out that when Act IX of 1861 came into force the District Courts could not appoint guardians of European British subjects, said with reference to that Act :—"The effect of this Act

European British subjects.

*Shannon's case.*

<sup>1</sup> Sec. 7.

<sup>2</sup> See Lecture V.

<sup>3</sup> See Lecture III.

<sup>4</sup> See Lecture IV.

<sup>5</sup> 2 N. W. P. Reps., 79; see, however, *In re W. N. Hutton*, 3. W. R. Rec. Ref. 5. As to the summary powers of the High Court with respect to the custody of European British subjects, see *post*, page 226.

was, we think, rightly stated in the case<sup>1</sup> decided by the Punjab Chief Court, to which we referred during the argument. The learned Judge who decided that case says :—‘Act IX of 1861 is to amend the law for hearing suits relative to the custody and guardianship of minors, and affects only to amend the previously existing law ; moreover, the Act did not affect to alter the law as to the guardianship of minors, but to alter the law as to the hearing of suits in relation to that matter. The Act relates to procedure, and procedure alone, from the beginning to the end.’ That was a different case from the present one, the question there being whether the Act conferred jurisdiction or authority on a District Court to appoint a guardian of a minor who is a European British subject. The appointment of a guardian was held to be matter of jurisdiction and of substantive law ; and the Act was construed to refer only to the procedure in cases of the description therein mentioned, and therefore to have no application. In the present case the application is not to appoint a guardian, but the father and natural guardian applies for the Court’s aid to enforce his rights, and to obtain possession of the persons of his minor children. Such aid the Supreme Court formerly afforded, and the High Courts, having

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*In the matter of Charlotte Twitchen, 28th Feb., 1867.*

succeeded to much of the jurisdiction and authority of that Court, may now be enabled in like manner to interfere. We have at present only to determine whether the Act authorizes the interference of the District Court. It is, we think, a law of procedure merely for particular cases: it does not alter jurisdiction, or transfer from one tribunal to another powers previously belonging to the former alone; nor can it, in our opinion, be held to have given a new concurrent power to the District Court.

"The 4th section of the Code of Civil Procedure<sup>1</sup> was cited, which enacts that no person, by reason of place of birth or descent, shall be, in any civil proceeding whatever, excepted from the jurisdiction of any of the Civil Courts

"This general provision of law does not, in our opinion, affect special legislation, such as that which has been provided for the care of the persons and property of minors."

Act IX of 1861 provides<sup>2</sup> that any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original civil jurisdiction in the district, by which such application, if preferred in the form of a regular suit, would be

The provisions of  
Act IX of  
1861.

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<sup>1</sup> Act VIII of 1859.

<sup>2</sup> Sec. 1.

cognizable, that is to say, to the principal Court of ordinary<sup>1</sup> original civil jurisdiction in the district within which the minor is residing at the time the petition is presented.

The High Court may, from time to time, by order, authorize any District Judge to transfer to a Subordinate Judge or Munsif under the control of such District Judge, any proceedings under Act IX of 1861, or any class of such proceedings, specified in such order, and then pending, or thereafter instituted, before such District Judge.<sup>2</sup>

The petitioner must set forth in his petition the grounds of his application.<sup>3</sup> The Court, if satisfied by examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, must give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and must fix as early a day as may be convenient for the hearing of the petition and the determination of the right to the custody or guardianship of such minor.<sup>3</sup>

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<sup>1</sup> *Maharanee Ram Bunsee Koonwaree v. Maharanee Soobh Koonwaree*, 7 W. R. C. R. 321; S. C. 2 Ind. Jur. N. S. 193; *Mussamat Harasundari Baistabi v. Mussamat Joyadurga Baistabi*, 4 B. L. R. App. 36; S. C. 13 W. R. C. R. 112; *Kristochunder Acharjee v. Kashee Thakoornnee*, 23 W. R. C. R. 340.

<sup>2</sup> Act VI of 1871, sec. 27.

<sup>3</sup> Act IX of 1861, sec. 1.

Act IX of 1861 further provides as follows :—

“ *Section 2.*—The Court may direct that the person having the custody, or being in possession of the person, of such minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

“ *Section 3.*—On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties or their agents, if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor, and the costs of the case.

“ *Section 4.*—In cases instituted under this Act, the Court shall be guided by the procedure prescribed in Act VIII of 1859<sup>1</sup> in so far as the same shall be applicable and material ; and any order made by the Court may be enforced as if such order had been made in a regular suit.”

Although the Court is directed by this Act to make such order as it shall think fit in respect to

The natural or testamentary guar-

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<sup>1</sup> See Act X of 1877, sec. 3, by which Act X of 1877 is substituted for Act VIII of 1859, in this section of Act IX of 1861.

dian of an  
infant to  
be prefer-  
red.

the custody or guardianship of a minor,<sup>1</sup> such provision does not give to the Civil Court such a large discretion as it possesses in proceedings under Act XL of 1858. In fact, the words "as it shall think fit" do not in reality import any discretion. They merely amount to a direction to the Court to use its judgment in accordance with the rules of law.

The preamble to Act IX of 1861 is as follows:—  
"Whereas it is expedient to amend the law for hearing suits relative to the custody and guardianship of minors." This shows, as pointed out in *Shannon's* case,<sup>2</sup> that that Act is one of procedure only, and makes no alteration in the powers possessed previously to that Act by the District Courts. It is, therefore, the duty of the Court proceeding under Act IX of 1861 to prefer to all others the natural or testamentary guardian<sup>3</sup> of the infant, unless he be incapacitated from performing his duty as guardian, or his character be such as to render him unfit for the post. Fitness is not, in proceedings under Act IX of 1861, as in those under Act XL of 1858, the first question for the Court to determine.

<sup>1</sup> Sec. 3.

<sup>2</sup> 2 N. W. P. Rep., 79, *ante* p. 219.

<sup>3</sup> See *Beedhun Bibee v. Fuzaloolah*, 20 W. R. C. R. 411; see Lecture II, as to who are natural guardians, and as to the appointment of testamentary guardians.



Act IX of 1861 provides<sup>1</sup> that nothing in that Act shall be taken to interfere with the jurisdiction exercised under Act XL of 1858, or by the Court of Wards, so even after provision has been made, under Act IX of 1861, for the custody and guardianship of a minor, there may be an appointment of a guardian under Act XL of 1858, or under the Court of Wards Act.<sup>2</sup> As the Court cannot, under Act IX of 1861, superintend, or make any order concerning the maintenance and education of the infant, it is evident, that, with respect to infants who possess property sufficient for their support and education, an order under that Act is only intended to extend until provision is made for them, and a guardian of their persons is appointed under the powers conferred upon the Civil Court by Act XL of 1858,<sup>3</sup> or, in the case of infants subject to the jurisdiction of the Court of Wards, until their estates be taken charge of by the Court of Wards.<sup>4</sup> With respect to minors possessing no property, to whom Act XL of 1858 has no application,<sup>5</sup> Act IX of 1861 provides for their guardianship and custody until their attainment of the age of majority.

There is no express provision in Act IX of 1861 for the removal of a guardian appointed under that Act on the ground of incompetency or improper

Proceedings under Act IX of 1861 no bar to proceedings under Act XL of 1858, or the Court of Wards Act.

Removal of guardian appointed under Act IX of 1861.

<sup>1</sup> Sec. 7.      <sup>2</sup> Act IV (B. C.) of 1870. Lecture III, *ante*.

<sup>3</sup> See Lecture IV, *ante*.

<sup>4</sup> See Lecture III, *ante*.

<sup>5</sup> See *ante*, Lecture IV.

conduct; and, if this can be done summarily under the Act, it can only be by the appointment of a fresh guardian under the provisions of Sections 2 and 3.

Appeal  
from orders  
made under  
Act IX of  
1861.

An appeal lies to the High Court from the orders made by the District Court under this Act, under the rules applicable to regular appeals to the High Court, except that the petition of appeal may be written on a stamp paper of the value prescribed for petitions to the High Court.<sup>1</sup>

Orders  
cannot be  
contested  
in a regular  
suit.

No order passed under Act IX of 1861 in respect to the guardianship or custody of a minor is liable to be contested in a regular suit.<sup>2</sup>

Powers of  
High  
Court.  
European  
British  
subjects  
resident in  
the Mofussil.

Formerly, the High Court possessed the power of deciding summarily the right to the custody of European British subjects by a writ of *habeas corpus*; but the exercise of that power was restricted to the town of Calcutta by the Code of Criminal Procedure.<sup>3</sup>

As a substitute for this power, which the High Court formerly possessed, the Code of Criminal Procedure provided<sup>4</sup> that "any European British subject who is detained in custody by any person, and who considers such detention unlawful, may apply to the High Court, which would have jurisdiction over him in respect of any offence commit-

<sup>1</sup> Act IX of 1861, sec. 5. As to appeals from orders of Subordinate Judges, see *Sonamoney Dossee v. Joy Doorga Dossee*, 17 W. R. C. R. 551.

<sup>2</sup> Act IX of 1861, sec. 6.

<sup>3</sup> Act X of 1872, sec. 82.

<sup>4</sup> Sec. 81.

ted by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the said High Court to abide such further order as may be made by it. The High Court, if it thinks fit, may, before issuing such order, inquire, on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application ; or it may issue the order in the first instance, and when the person applying for it is brought before it, it may make such further order in the case as it thinks fit, after such enquiry as it thinks necessary."

This provision is but a poor substitute for the ancient prerogative writ of *habeas corpus*, and it is doubtful whether it be at all applicable as a remedy against the illegal custody of infants. The fact that the person detained must make the application, and also the words "who considers such detention unlawful," seem to show that the legislature did not intend this section to return to the High Court any portion of the powers which it formerly possessed with respect to providing summarily for the custody of infants residing outside the limits of its ordinary original jurisdiction.

Let us now see how the custody of infants <sup>Infants resident in Calcutta.</sup> resident in Calcutta can be summarily provided for.

The writ of  
*habeas*  
*corpus*.

Until recently the High Court could issue a writ of *habeas corpus* directed to the person in whose custody the infant was, and requiring him to bring the infant into Court, in order that the Court might make such order in respect of the infant's custody, as it might think proper. The practice in that case was for the person seeking the assistance of the Court to apply for a rule requiring the person having the custody of the infant to show cause why a writ of *habeas corpus* should not issue. If the cause shown were not sufficient, the Court issued the writ, requiring the infant to be brought into Court on a certain day. The person, against whom the writ was directed, would then have to make a return to the writ, and produce the infant in Court.

The High  
Courts'  
Criminal  
Procedure  
Act.

The power of the High Court to issue writs of *habeas corpus* for certain purposes within the town of Calcutta, was taken away by the High Courts' Criminal Procedure Act,<sup>1</sup> which has, however, given to the Court power to make for those same purposes orders which, except in name, are equivalent to writs of *habeas corpus*.

The 148th section of that Act gives to the High Court of Judicature at Fort William power to direct (amongst other things) that a person within the local limits of its ordinary original criminal jurisdiction be brought up before the Court to be

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<sup>1</sup> Act X of 1875.

dealt with according to law, and that a person, illegally or improperly detained in public or private custody within such limits, be set at liberty. The same section provides that neither the High Court, nor any Judge thereof, shall issue any writ of *habeas corpus* for such purpose. The other purposes for which this section takes away the power of the High Court to issue writs of *habeas corpus* are in no way applicable to the subject, which we are now discussing.

This provision in the High Courts' Criminal Procedure Act was probably intended to give redress to a person lawfully entitled to the custody of an infant against a person unlawfully in possession of the person of such infant: <sup>1</sup> and if it does not meet such case, the power of the High Court to issue a writ of *habeas corpus* for the purpose of causing an infant to be brought before the Court would still remain.

The 148th section further provides that the High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in cases under that section, and that till such rules are framed, the practice of the High Court as to the obtaining,

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<sup>1</sup> On the 10th of September, 1877, Macpherson, J., at the instance of the husband of a female infant, issued a *rule nisi*, calling upon the person, in whose custody the infant was, to show cause why an order should not be made under the 148th section of the High Courts' Criminal Procedure Act.

granting, and serving of writs of *habeas corpus*, and as to the returns thereto, shall apply in such cases.

The only rule made by the High Court which has any reference to the case of infants alleged to be detained in illegal or improper custody, and in respect of whom an application is made to the Court under Section 148 of the High Courts' Criminal Procedure Act, is rule 3 of the rules made by the High Court in pursuance of that section. That rule provides, that "every application to bring up before the Court a person alleged to be illegally or improperly detained in custody, shall be supported by affidavit or affirmation, stating where and by whom the person is detained in custody, and [so far as they are known] the facts relating to such detention, with the object of satisfying the Court that there is probable ground for supposing that such person is detained in custody against his will, and without just cause."

The return  
to the writ  
or order.

It has never apparently been settled whether the return to the writ or order must be taken as conclusive of the facts stated therein, or whether the person seeking the assistance of the Court by means of such writ or order can by affidavit deny the truth of the facts stated in the return.

With respect to this there have been, within a short time of each other, two conflicting decisions of the High Court.

In the case of the *Queen v. Vaughan*, *In the matter of Ganes Sundari Debi*,<sup>1</sup> decided on the 11th of May, 1870, Mr. Justice Phear held, that the return must be taken as true, and cannot be controverted by affidavit. In that case the learned Judge, while admitting that there are authorities in support of the position that the truth of the return to the writ may be controverted by affidavits, and after saying, "so far as I am able to discover, and so far as my own experience has gone, those authorities are of very early date, and are not now binding—later decisions have all gone the other way," decided that, inasmuch as 56 Geo. III, c. 100, upon which Act<sup>2</sup> Lord Tenterden, in *Ex parte Beeching*,<sup>3</sup> placed the right to controvert the return, does not apply to this country, the return to the *habeas corpus* cannot be questioned on the occasion of determining the validity of the detention.

In another case,<sup>4</sup> decided on the 25th of May, 1870, Norman, J., held a different opinion from that of Phear, J., and considered that the return was not necessarily conclusive. In that case, Norman, J., after stating that he felt great hesitation in assenting to the proposition that the return must be taken as conclusive of the facts therein stated, said—"the question is one which has been much debated,

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<sup>1</sup> 5 B. L. R. 418.

<sup>2</sup> Sec. 4.

<sup>3</sup> 4 B. & C. 136.

<sup>4</sup> *In the matter of Khatije Bibi*, 5 B. L. R. 557.

and in England doubts on the subject have been set at rest in cases like the present by a Statute, 56 Geo. III, c. 100, which does not apply to this country. When the return sets out an adjudication by a Court of competent authority, it is well settled that parties will not be allowed to controvert facts directly decided by such authority. That is the ground taken *In the matter of Clarke*.<sup>1</sup> But the judgments of Lord Denman, C. J., and Patteson, Williams, and Wightman, JJ., in *In re Carus Wilson*,<sup>2</sup> to say nothing of other cases, appear to me to show that in other respects the return does not preclude enquiry into the truth of matter alleged therein. I should hesitate long before pronouncing that I could be precluded by anything in the return in this case from seeing Khatija Bibi<sup>3</sup> with my own eyes, if I thought it necessary, causing such an enquiry to be made as to her age and condition as would enable me to determine whether or not Khatija is now legally in the custody of Assa Bibi—an enquiry of a character similar to that which was directed by the Court of King's Bench in the case of the *Hottentot Venus*,<sup>4</sup> a native of South Africa brought from thence, and exhibited in London, as it was supposed against her own consent, or such an enquiry as that by which Mr. Justice Phear

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<sup>1</sup> 2 Q. B. 419.

<sup>2</sup> 7 Q. B., 1008-1112.

<sup>3</sup> The infant in respect of whose custody the writ was issued.

<sup>4</sup> 13 East, 195.



satisfied himself that there was no reason to doubt the truth of the return in the *Queen v. Vaughan*, *In the matter of Ganes Sundari Debi*.<sup>1</sup>

There seems, however, to be no doubt that, whether or not the truth of the matters stated in the return can be controverted, the Court has full power, and it is the duty of the Court, to examine the infant in person, and, if possible, to ascertain the true facts from such examination.<sup>2</sup> The infant must, in every case, be brought into Court, so that the Court may ascertain from such infant whether he or she is under any illegal restraint. Even though the infant be a *pardahnashin* she must be brought into Court, and cannot be examined by commission.<sup>3</sup>

In many cases a sufficiently expeditious and eminently more satisfactory remedy for persons seeking to obtain the custody of infants is to file a suit and make a petition in such suit; but where there is immediate danger to the physical or moral welfare of an infant by its remaining in its present custody, the best course generally would be to apply for an order in the nature of a *habeas corpus*, in which case no suit is necessary. But in making such order the Court can give only a very limited remedy. The broad rule is, as laid down by Lord

Infant should be brought into Court and examined.

The extent of the summary relief which can be afforded by the Court.

<sup>1</sup> 5 B. L. R., 418.

<sup>2</sup> See *In the matter of Khalija Bibi*, 5 B. L. R., 557.

<sup>3</sup> *In the matter of S. M. Beenodeeny Dossee*, 2 Hyde 152; S. C. Coryton 78. See *In re Thakoormoney Dossee*, 1 Hyde 176.

Mansfield in *R. v. Delaval*,<sup>1</sup> namely that "the Court is bound, *ex debito justitiæ*, to set the infants free from an improper restraint, but they are not bound to deliver them over to any body nor to give them any privilege." On a writ of *habeas corpus*, or an order of the nature of such writ, the Court cannot appoint a guardian of the infant's person. All it can do is to release the infant from illegal or improper custody, and where the infant is capable of exercising a discretion,<sup>2</sup> to allow it to choose in whose custody it should remain; or where the infant is not of such capacity, to determine what is the legal custody of the infant, and to commit the infant to such custody; or where it is improper that the infant should remain in charge of the person having the legal right to the custody of it, to commit the infant to the custody of some other person, who would generally be the person next entitled by law to the custody of such infant.<sup>3</sup>

Who can  
apply to  
the Court  
for relief.

The order cannot be applied for by a stranger. It can be applied for by the infant himself, or by his father or legal guardian, or by the nearest relative.<sup>4</sup>

Interference with  
father's  
custody.

We have seen in the fifth lecture in what cases the Court will interfere with the right of a father

<sup>1</sup> 3 Burr. 1436.

<sup>2</sup> See *post*, p. 242.

<sup>3</sup> See Forsyth on the Custody of Infants, Chap. III.

<sup>4</sup> *Re Daley*, 2 F. & F., 258.

to the custody of his children, and will appoint another person to act as their guardian. On an application for an order of the nature of a writ of *habeas corpus* directed against the father, some of the considerations which actuate the Court in appointing a person to act as guardian in the place of the father would be a guide in determining whether the child should remain in its father's custody; but in a proceeding in the nature of a *habeas corpus*, the Court would only interfere with the custody by the father, where he has been guilty of cruelty to, or personal ill-usage of, the infant, or his conduct be of such a nature as to be likely to contaminate and corrupt the morals of his children.<sup>1</sup>

This applies only where the Court, being moved by the infant, or its mother, or other relative, actually finds the infant in the father's custody.<sup>2</sup> Where the father is applying to the Court for the enforcement of his rights to the custody of his infant child, the Court will go beyond those questions, and will not give the child to its father in any of the cases which, as we saw in the fifth lecture, would justify the Court in appointing a person to act as guardian in the place of the father, or in restraining the father from interference with the

Distinction between cases where the father is applying for custody, and cases where the application is made against the father.

<sup>1</sup> See *In the matter of A. E. Carran*, 1 Hyde 143.

<sup>2</sup> See Forsyth on the Custody of Infants, p. 66.

education and maintenance and custody of the infant, as for example where he has lost his rights by contract or waiver.

Where  
custody  
has been  
obtained  
by force or  
fraud.

There is also this difference between the cases where the Court will, on the application of the father, make an order of the nature of a writ of *habeas corpus*, and cases where it will make such order as against him, namely, that, where the father has even obtained possession of his infant child by force or fraud, that fact by itself is no ground for depriving the father of the custody, whereas, in the case of any person other than the father having used force or fraud for the purpose of obtaining possession of the body of the infant, the Court will require the infant to be returned to the custody from which it has been removed by that means. As Lord Chancellor King laid down in *Ex parte Hopkins*,<sup>1</sup> a father has the undoubted right to the guardianship of his own children ; if he can in any way gain them, he is at liberty to do so, provided no breach of the peace be made in such an attempt, but the children must not be taken away by him in returning from or coming to the Court, and any person attempting so to do commits a contempt of Court. The father can apparently use fraud and such force, as does not amount to a breach of the peace, for the purpose of obtaining

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<sup>1</sup> 3 P. Wms. 154.

possession of his children.<sup>1</sup> Indeed it is a question whether, even where he does use such force as would render him liable to an indictment for a breach of the peace, the Court would on that ground interfere with his custody of the children.<sup>2</sup> In the case of an application being made to take away a child from any person other than the father, the Court will always, where force or fraud has been made use of, require the infant to be replaced in the custody from which it has been taken by means of such force or fraud ; and it must be remembered that, with respect to an illegitimate child, the relationship of the putative father to his child not being recognised by the law, the father, equally with any other stranger, is not entitled to gain the possession of it by even the slightest degree of force or fraud.<sup>3</sup>

The writ of *habeas corpus*, or an order of the nature of such writ, has, as we have seen, nothing to do with the question as to who is the proper guardian of the child. It can only consider what is the proper and legal custody at the time of the issuing of such writ or order. In one case,<sup>4</sup> where

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<sup>1</sup> See *Ex parte Hopkins*, 3 P. Wms. 154; *De Manneville v. De Manneville*, 10 Vesey 62.

<sup>2</sup> See Forsyth on the Custody of Infants, p. 92; and *Strangeways v. Robinson*, 4 Taunt, 506.

<sup>3</sup> See *R. v. Lopez*, 5 T. R. 278; *R. v. Moseley*, 5 East. 229, n. (a); see *ante*, Lecture II as to the right of custody of illegitimate children.

<sup>4</sup> *R. v. Hopkins*, 7 East. 579.

the putative father had obtained possession of his bastard child from the mother by force and by fraud, Lord Ellenborough said:—"It appears that the mother of the child, so-called, had it in her quiet possession, under her own care and protection, during the period of nurture. That she was first divested of her possession by stratagem, and after recovering it again, was afterwards dispossessed of it by force. In such a case everything is to be presumed in her favour. Without touching, therefore, the question of guardianship, we think that this is a proper occasion for the Court, by means of this remedial writ, to restore the child to the same quiet custody in which it was before the transactions happened, which are the subject of complaint, leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle.

Testamen-  
tary guar-  
dian.

Testamentary guardians appointed by the father are in the same position as the father himself, and the Court will enforce their rights to exactly the same extent as it will enforce the rights of the father.

Court may  
exercise  
discretion  
in questions  
of sum-  
mary dis-  
posal of  
custody of  
infant.

Where a clear right is shown by the father or other legal guardian to the custody of the infant, the Court will not, except in extreme cases, refuse to deliver up the custody of the infant to him.<sup>1</sup>

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<sup>1</sup> The Court recognizes the rights of the guardians of foreign infants. See *Nugent v. Vetzera*, L. R. 2 Eq. 704.

There is, however, no doubt that much is left to the discretion of the Court in questions as to the summary disposal of the custody of an infant.

In the case of *ex parte Intiazoonnissa Begum*,<sup>1</sup> Sir Thomas Strange, the Chief Justice of Madras, said :—The Court has a discretion to deliver the child to either parent, according to circumstances, without regard to the legal right. When called upon to interpose by granting a *habeas corpus*, it is at liberty to judge of the propriety of the application, and of the expediency of giving it its effect. This is clear from all the other cases that have been cited ; and is indeed no more than an application of the rule deduced by Lord Mansfield in the *King v. Delaval*<sup>2</sup> from a review of the principal authorities on the subject as far back as Queen Anne's reign, which he thus lays down, *viz.* :—" That the Court are to judge upon the circumstances of the particular case, and to give their directions accordingly."

In certain cases the Court will allow the infant to exercise a choice between the persons claiming the custody of his person.

Exercise of  
choice by  
infant.

In a case<sup>3</sup> decided by Sir Mordaunt Wells, it was held that a Hindu infant cannot exercise any such

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<sup>1</sup> 2 Strange's Notes of Cases, 115.

<sup>2</sup> 1 W. Bl. 412 ; S. C. 3 Burr. 1434.

<sup>3</sup> *In the matter of Himnath Bose*, 1 Hyde 111.

choice. In that case a Hindu lad of the age of between 15 and 16 years left his parents, and of his own free will went to reside at a Christian mission house. The father obtained a writ of *habeas corpus* directed to the persons in charge of the mission house, and requiring them to show cause why the infant should not be delivered over to his father. The persons to whom the writ was directed made a return stating that the infant had never been detained in their custody ; that he was a young man of intelligence, and able to form an opinion for himself ; that he voluntarily went to the house of the clergyman in charge of the converts at the mission house, and begged to be allowed to live there ; and that he had ever since lived there of his own free will and at his own request, and without being detained in any way ; and that his father and all other persons who had expressed a wish so to do, had been allowed to see him alone, he being free from all control, and that his father had had full access to him ; and that he had been frequently asked in his father's presence to exercise his own free will, and to depart from the mission house, but that he refused to do so. On these facts Sir Mordaunt Wells ordered the infant to be given up to his father. In his judgment, Wells, J., remarked that he thought it must be held that the rule established in England as to the discretion of infants did not hold at all in that case ; and that,



under Hindu law, and the law administered by the High Court, a Hindu parent is entitled to the custody of his child up to the age of 16 years.<sup>1</sup>

It is not very clear from the judgment in *In the matter of Himnauth Bose*<sup>2</sup> what reason the Judge had for saying that the English rules as to the exercise of his discretion by an infant did not apply in this country. The question as to whether the Court, when deciding as to the custody of an infant, can take into consideration the wishes of the infant, has been much discussed in England; and in several cases it has been held by English Courts to depend upon the degree of intelligence of the infant, and to be quite independent of the age of majority. Under the English law, as Lord Denman laid down in *R. v. Greenhill*,<sup>3</sup> "when an infant is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of discretion would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

<sup>1</sup> In this case the boy had attained the age of 15 years, which (see *ante*, Lecture II, is the age of majority of Hindus subject to the Bengal school of law. This age is also the age of discretion under the Hindu law. See Lecture I, and *Jumona Dassya v. Bamasoondari Dassya*, 1 I. L. R. C. S. 289; S. C. L. R. 3 I. A. 72; and 25 W. R. C. R. 235. *Rajendro Narain Lahoree v. Saroda Soonduree Dabee*, 15 W. R. C. R. 548.

<sup>2</sup> 1. Hyde 111. See Mayne's Commentaries on the Indian Penal Code 9th ed., page 291.

<sup>3</sup> 4 Ad. & Ell. 640.

It is now settled law in England that no choice can be made at all events by a female infant under the age of sixteen.<sup>1</sup> This age was fixed with reference to the Act,<sup>2</sup> rendering penal the abduction of unmarried girls under that age.

Applying to India the principles which guided the English Courts in fixing this age, it is clear that a male infant cannot exercise any choice with reference to the custody of his person until he has attained the age of fourteen years, and that a female infant cannot exercise such discretion until she has attained the age of sixteen, inasmuch as the Indian Penal Code<sup>3</sup> defines the offence of kidnapping as follows:—"Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship." Kidnapping being an offence independently of the consent of the minor, the legislature has, by the above provision in the Indian Penal Code, taken away from male minors under the age of fourteen, and from female minors under

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<sup>1</sup> See *In re Mary Ellen Edwards*, 42 L. J. Q. B. 102; and *The Queen v. Howes*, 30 L. J. M. C. 47.

<sup>2</sup> 24 and 25 Vict., c. 100, s. 55.

<sup>3</sup> Act XLV of 1860, sec. 361.

the age of sixteen, any liberty of choice with regard to the custody of their persons<sup>1</sup>.

Certain limited powers are also possessed by the Presidency Magistrates with respect to the custody of female infants. Powers of  
Presidency  
Magis-  
trates.

Section 17 of the Presidency Magistrates Act<sup>2</sup> provides that "upon complaint made to a Presidency Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of fourteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge or government of such child, and may compel compliance with such order, using force if necessary.

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<sup>1</sup> See *Queen v. Vaughan. In the matter of Ganes Sundari Debi*, 5 B. L. R. 430, 431.

<sup>2</sup> Act IV of 1877. This section is nearly word for word the same as sec. 31 of Act IV (B. C.) of 1866.

## LECTURE VII.

### THE MAINTENANCE OF INFANTS.

THIS lecture will be devoted to a consideration of the powers possessed by Courts in Bengal to provide for the maintenance of infants, either by compelling their fathers to maintain them, or by appropriating for the purpose of their maintenance funds capable of being used for that purpose.

The duty of guardians to provide for the maintenance of their wards apart from an order of Court, and the powers which they possess for that purpose, will be considered in a future lecture.<sup>1</sup>

Duty of  
father to  
maintain  
his chil-  
dren.

According to the Hindu,<sup>2</sup> Mahomedan,<sup>3</sup> and English laws alike, it is the duty of a father to support each of his children as are incapable of supporting themselves. According to Mahomedan law, this duty falls on the father alone. Hindu law apparently extends the obligation to other relations,<sup>4</sup> but in the case of relations other than the father, the obligation of supporting infants would, amongst Hindus, be only a religious obligation, and not enforceable by law. In fact, it is doubtful how far

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<sup>1</sup> Lecture IX.

<sup>2</sup> Strange's Hindu Law, chap. iii, p. 67.

<sup>3</sup> See Baillie's Digest, 455.

<sup>4</sup> See Strange's Hindu Law, chap. iii, p. 67.

the obligation can be enforced against the father, if it can be enforced at all.

Where, however, there are circumstances from which it can be reasonably inferred that the father has given his infant son authority to contract a debt, the father may be liable in respect of the debt so contracted, but the mere moral obligation to maintain his child affords no inference of a legal promise to pay his debts.<sup>1</sup>

Where authority to contract debts.

Slighter evidence of such authority will apparently be required, when the goods are necessaries, than when they are not so; but where the circumstances do not imply any authority to incur debts for necessaries, or where they expressly negative any such inference, there can be no liability, as for instance, where the father has no knowledge of the debts being incurred,<sup>2</sup> or where the son has an allowance.<sup>3</sup>

Where the father permits his children to live with his wife, or any other person, apart from him, it may be a question whether by so doing he does not authorize his wife, or such other person, to incur debts for necessaries for his children.<sup>4</sup>

The father might also, under the 70th section of The Indian Contract Act, s. 70,

<sup>1</sup> See *Mortimore v. Wright*, 6 M. & W. 486-7.

<sup>2</sup> See *Urmston v. Newcomen*, 4 A. & E. 899.

<sup>3</sup> *Crantz v. Gill*, 2 Esp. 471.

<sup>4</sup> *Rawlins v. Vandyke*, 3 Esp. 252; *Cooper v. Phillips*, 4 C. & P. 581.



the Indian Contract Act,<sup>1</sup> which provides that "where any person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered," be required, at any rate to the extent that the criminal law renders him liable for the maintenance of his child, to recoup a person who had supplied necessities to his child. This, however, is very doubtful.

Although the English law, as administered by the High Court in its Original Civil Jurisdiction, recognises the duty of the father to maintain and educate his infant children, that Court has no direct means of enforcing this obligation.<sup>2</sup> The Court can, however, as we shall see hereafter, in certain cases, where the father attempts to relieve himself of such obligation by applying to the maintenance of his child separate funds belonging to that child, indirectly impose upon him the liability of providing for his child out of his own income.

Duty can only be directly enforced by the criminal law.

The only means by which a father in Bengal can be directly compelled to maintain his infant children is by the criminal law, which forces the father to provide a subsistence for his children;

<sup>1</sup> Act IX of 1872.

<sup>2</sup> See remarks of Lord Eldon, L. C., in *Wellesley v. The Duke of Beaufort*, 2 Russ. at p. 23.

but he cannot be compelled to educate them, or even to support them according to his own station in life. A bare subsistence is all that he can be compelled to provide for them.

The Code of Criminal Procedure,<sup>1</sup> which operates throughout the whole of Bengal except the town of Calcutta, provides<sup>2</sup> as follows:—"If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain himself, the Magistrate of the District, or a Magistrate of a division of a District, or a Magistrate of the first class, may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty rupees in the whole, as to such Magistrate seems reasonable. Such allowance shall be payable from the date of the order.

The provisions of the Criminal Procedure Code with respect to maintenance.

"If such person wilfully neglects to comply with this order, such Magistrate may, for every breach of the order, by warrant direct the amount due to be levied in the manner provided for levying fines,<sup>3</sup> and may order such person to be imprisoned with or without hard labour for any term not exceeding

How Magistrate's order enforced.

<sup>1</sup> Act X of 1872.

<sup>2</sup> Sec. 536.

<sup>3</sup> *i. e.*, by distress and sale of the moveable property of the father within or without the district of the Magistrate making the order, see sec. 307 of Act X of 1872.

one month for each month's allowance remaining unpaid."

Alteration  
of allow-  
ance.

The Code of Criminal Procedure<sup>1</sup> also provides that, on the application of any person receiving or ordered to pay a monthly allowance under the above provision, and on proof of a change in the circumstances of such person, his wife, or child, the Magistrate may make such alteration in the allowance ordered as he deems fit, provided the total sum of fifty rupees a month be not exceeded.

Thus at any time the maintenance allowance can be either increased or reduced, but only on proof of a change of circumstances in the person by whom, or the person for whose benefit, the payment is made. This provision cannot be used as a means of reviewing the Magistrate's decision except upon proof of facts which have occurred since the date of the order.

There is no appeal from an order made by the Magistrate requiring a person to make a monthly allowance for the maintenance of his wife or child;<sup>2</sup> but if there be any material error in the proceedings, the order may be revised by the High Court.<sup>3</sup>

To whom  
the allow-  
ance is to  
be paid.

Where a father has been ordered to provide for the maintenance of his infant child, the Code of Criminal Procedure does not say to whom the

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<sup>1</sup> Act X of 1872, sec. 537.

<sup>2</sup> See the *Queen v. Gholam Hossein Chowdry*, 7 W. R. Cr. R. 10.

<sup>3</sup> See Act X of 1872, sec. 297.



monthly allowance is to be paid. Presumably the mother, and on her death the person entitled after her to the custody of the infant,<sup>1</sup> would generally be entitled to receive the allowance, but the Magistrate can, in the exercise of his discretion, permit any other person to receive the allowance for the infant.

The Criminal Procedure Code<sup>2</sup> further provides,<sup>3</sup> that a copy of the order of maintenance shall be given to the person for whose maintenance it is made, or to the guardian of such person; and that it shall be enforceable by any Magistrate in any place where the person to whom the order is addressed may be, on the Magistrate being satisfied as to the identity of the parties and the nonpayment of the sum claimed.

Provisions, almost word for word, identical with those contained in the Criminal Procedure Code, with reference to the maintenance of wives and children, are now made applicable to Calcutta by the Presidency Magistrates' Act,<sup>4</sup> which came into operation on the 1st of April, 1877. That Act provides<sup>5</sup> as follows:—"If any person, having sufficient means, neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof thereof by evidence, order such

The Presidency  
Magistrates' Act.

<sup>1</sup> As to the right of custody of infants, see *ante* Lecture II.

<sup>2</sup> Act X of 1872.

<sup>3</sup> Sec. 538.

<sup>4</sup> IV of 1877.

<sup>5</sup> Sec. 234.

person to make a monthly allowance for the maintenance of his said wife or child, or both, at such monthly rate not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs. Such allowance shall be payable from the date of the order.

“If any person so ordered wilfully neglects to comply with the order, a Presidency Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore<sup>1</sup> provided for levying fines ; and may sentence such person for each month's allowance remaining unpaid to imprisonment for any term not exceeding one month.

On the application of any person receiving or ordered to pay a monthly allowance under the above provision, and on proof of a change in the circumstances of such person, his wife or child, the Magistrate may make such alteration in the allowance ordered as he thinks fit, provided the monthly rate of fifty rupees be not exceeded.”<sup>2</sup>

The Presidency Magistrates' Act also provides,<sup>3</sup> that a copy of the order of maintenance shall be

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<sup>1</sup> Namely, by distress and sale of any moveable property belonging to such person either within or without the jurisdiction of the Magistrate making the order. See sec. 185 of Act IV of 1877.

<sup>2</sup> Act IV of 1877, sec. 235. This provision is an improvement upon the old law, which permitted only a reduction, and under no circumstances an increase, in the allowance. See Act IV of 1866, sec. 30.

<sup>3</sup> Sec. 236.

given without fee to the person in whose favour it is made, or to his guardian (if any); and that such order shall be enforceable by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the nonpayment of the allowance due.

The provisions contained in the Criminal Procedure Code and the Presidency Magistrates' Act with reference to the maintenance of wives and children, apply to all persons of whatever nationality residing in Bengal.

The obligation which the criminal law imposes upon the father is necessarily of an imperfect description. The most that the Criminal Courts can give is a bare subsistence, and they cannot compel the father to pay anything towards the child's education. As soon as the child is able to support himself, however young he may be, either by his own labour or by any fund which he may acquire, the Criminal Courts cease to have any power to compel the father to maintain him.

Let us now see what powers are possessed by the Civil Courts to provide for the maintenance of infants, Power of  
Civil  
Courts.

Where the infants are wards of the Court of Wards, that Court has, as we have seen,<sup>1</sup> ample Court of  
Wards.

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<sup>1</sup> *Ante*, pp. 114 and 130.

powers to provide for the maintenance and education of the infant out of the income of his estate, and that, apparently, whether or not the father may be alive, and able to maintain the infant and provide for its education out of his own funds.

Act XL of  
1858.

It is not very clear what provision the legislature intended to make for the maintenance and education of infants, of whose estates a certificate of administration has been granted by a Civil Court in pursuance of the powers given to it by Act XL of 1858.<sup>1</sup>

Where a certificate has been granted to the Public Curator or to another person under the provisions of Section 10 of that Act, the Court may<sup>2</sup> fix such allowance as it may think proper for the maintenance of the minor; and such allowance is to be paid to the guardian of the infant by the Public Curator or other person to whom the certificate has been granted under the above provisions. But where a certificate of administration has been granted under the provisions of Section 7 of that Act to a person entitled to have charge of the minor's property by virtue of a will or deed, or to a near relative of the minor, and a guardian of the infant's person has been appointed under the same section, no express power is

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<sup>1</sup> *Ante*, Lecture IV.

<sup>2</sup> Act XL of 1858, sec. 11, see *ante*, Lecture IV.

given to the Civil Court to fix the amount payable by the certificate-holder to the guardian for the purposes of the maintenance and education of the infant. Certificate-holders of this last mentioned description would, therefore, be in the position of ordinary guardians with respect to the maintenance of the infants whose estates they are administering, and would be required to provide out of the income of the minor's estate for his maintenance and education in a manner suitable to his position in life.<sup>1</sup> The Civil Court exercises a general superintendence over the education of minors brought under the operation of Act XL of 1858, and would, therefore, be able to control and fix the amount requisite for their education.

These are the powers exercised by Courts in the mofussil with respect to the maintenance of infants. The High Court, as we saw in the fifth lecture, has apparently power to appoint guardians, at least to European British subjects, if not to persons of all nationalities, throughout Bengal,<sup>2</sup> and this power given to the High Court by its Charter might possibly be considered to include the power to allot maintenance to an infant. There is, however, this difficulty, namely, that even if the High Court can appoint guardians of infants not subject to its ordinary original jurisdiction, it is very doubtful

The powers  
of the High  
Court.

<sup>1</sup> See *post*, Lecture IX.

<sup>2</sup> See *ante*, Lecture V.

whether that Court has any power to administer the estates of such infants,<sup>1</sup> and without such power over the infants' property being given, the High Court cannot make any provision for the infants' maintenance. Where, however, the infant has property in Calcutta, or the infant is residing in Calcutta, the High Court, in the exercise of its ordinary original civil jurisdiction, has abundant powers for the purpose of providing for the maintenance and education of the infant.

The exercise of these powers is regulated by principles similar to those which guide the Court of Chancery in allotting maintenance to infants.

The application for maintenance should be by petition, and it may be granted without a reference, and although there is no suit pending.<sup>2</sup>

There must  
be a clear  
fund or in-  
come.

To empower the Court to make an order with reference to the maintenance of an infant, it is necessary that the infant should possess a clear fund or income applicable to the purpose,<sup>3</sup> and that the interest of the infant in such fund or income should be vested in possession.<sup>4</sup>

<sup>1</sup> See High Court Charter, 1865, sec. 17; High Court Charter, 1862, sec. 18; and Supreme Court Charter, 1774, clause 25.

<sup>2</sup> *Ex parte Whitfield*, 2 Atk. 316; *Ex parte Chambers* 1 R. & M. 580; see also *In the matter of Bittan*, I. L. R. 2 Calc. 357.

<sup>3</sup> *Warter v. ———*, 13 Ves. 92.

<sup>4</sup> See Simpson on the Law of Infants, p. 242. Macpherson on Infants, p. 241. As to the vesting of legacies, see Part xiii of the Indian Succession Act (X of 1865), and the Hindu Wills Act (XXI of 1870).

Before any part of the infant's income can be applied to its maintenance, provision must be made for any debts or charges affecting the infant's estate, and no maintenance can be allowed where the fund, which may become applicable to that purpose, depends on the doubtful result of accounts. However, where the Court can see clearly that there will, after the taking of such accounts, be a certain balance left to the infant, maintenance not exceeding the income of that certain balance may be ordered.<sup>1</sup>

Where the infant is entitled to immediate payment of the interest of a fund, maintenance can be allowed out of such interest.<sup>2</sup>

Provided the infant has a vested interest in the *corpus* of property, and the income of such property is not payable to any other person, the Court can provide out of such income for the maintenance of the infant, although the person through whose will, gift, or settlement the infant has become entitled to the property has expressly directed that the income of the property shall be accumulated during the minority of the infant.<sup>3</sup> It is immaterial whether the instrument creating the infant's interest in the property contains any directions for its maintenance.

Maintenance can be given in spite of direction to accumulate.

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<sup>1</sup> *Warter v. ———* 13 Ves. 92.

<sup>2</sup> *Boycott v. Cotton*, 1 Atk. 552.

<sup>3</sup> *Stretch v. Watkins*, 1 Mad. 253.

In one case,<sup>1</sup> where a father gave a legacy absolutely to each of his infant daughters, and directed the interest to be accumulated during minority, except a small sum "to find her in clothes, &c.," Sir T. Plunkett, V. C., said, that the legacies being vested, the Court would allow what was necessary for the infant's maintenance.

Interest of  
infant must  
be vested.

The interest of the infant in the property must be a present vested one. No provision can be made for an infant's maintenance out of a gift which is vested but the payment of it is postponed,<sup>2</sup> or out of a contingent gift,<sup>3</sup> except where the instrument of donation itself provides for the maintenance of the infant (in which case maintenance can always be allowed<sup>4</sup>), or where the gift is one made by the father, or by some other person standing *in loco parentis* to the infant, and the infant is otherwise unprovided for,<sup>5</sup> or it is a gift to a class, all or some of whose members must take, or it is a gift to a class or an individual, and the donees over in default of the class or individual taking consent to maintenance being given.<sup>6</sup>

Exceptions  
to this rule.

<sup>1</sup> *Stretch v. Watkins*, 1 Mad. 253.

<sup>2</sup> See *Festing v. Allen*, 5 Hare 577.

<sup>3</sup> See *Butler v. Freeman*, 3 Atk. 58; and cases collected in Simpson on the Law of Infants, p. 245 note (n.)

<sup>4</sup> See *Lyddon v. Lyddon*, 14 Ves. 558; *Ellis v. Maxwell*, 3 Beav. 587; *Poulett v. Poulett*, 6 Mad. 167.

<sup>5</sup> See Simpson on the Law of Infants, p. 246; Macpherson on the Law of Infants, p. 234.

<sup>6</sup> See Simpson on the Law of Infants, p. 253.



Maintenance may apparently be given whether or not there is a possibility of future members of this class coming into existence. In one case,<sup>1</sup> where a grandfather left property to his grandchildren, the children of his son and daughter, and directed that the income of such property should be accumulated during the lifetimes of his wife, son, and daughter, after whose deaths the property was to be divided amongst the grandchildren on their attaining the age of twenty-one years, the Court, after the deaths of the wife and son, but during the lifetime of the daughter, allowed maintenance to one of the grandchildren out of the income of the property.

Lord Eldon seems, however, to have been of a contrary opinion, and to have considered, that if the class were capable of expansion, by future members of it coming into existence, no maintenance could be allowed out of the income to present members of the class;<sup>2</sup> but Lord Eldon's opinion is not now followed.<sup>3</sup>

As we have seen above, a father is bound to maintain his infant children, whether or not they possess separate property, and there be in the instrument by which they obtain such separate pro-

Indirect  
means of  
compelling  
father to  
maintain  
children.

<sup>1</sup> *McDermott v. Kealy*, 3 Russ. 264 n.; *Brandon v. Aston*, 2 Y. & C. C. 30.

<sup>2</sup> *Lomax v. Lomax*, 11 Ves. 48.

<sup>3</sup> See Simpson on the Law of Infants, p. 262.

perty a provision, or a direction for their maintenance. This obligation does not extend to the mother,<sup>1</sup> or to any person other than the father, and it is an obligation which cannot be directly enforced by a Civil Court; but the Court can indirectly enforce it by preventing or superintending the appropriation of the infants' funds for the purpose of their maintenance.

Cases where Court will allow maintenance to infant during lifetime of father.

Where father's income is insufficient.

There are, however, a few cases in which the Court will make an allowance for an infant's maintenance out of funds belonging to the infant even during the lifetime of the father of the infant. Where the father is not in such circumstances as to be able to give his child such an education as is suitable to the fortune of such child, the Court would order maintenance out of the child's own funds.<sup>2</sup> It is not necessary that the father should be an insolvent or absolutely unable to support his children at all. The Court requires that the infants should be brought up in a manner suitable to the position which they will occupy on coming in to their fortunes, and if the father has not an income sufficient for the purpose, recourse must be had to the children's funds. What such suitable manner is, depends upon the circumstances of each particular case, and the amount of the infant's separate property.

<sup>1</sup> Dan. Ch. Pr., 5th edn., p. 1201.

<sup>2</sup> See *Buckworth v. Buckworth*, 1 Cox. 80.

In one case<sup>1</sup> Sir W. Grant, M. R., said, that it would be a harsh thing for the Court to oblige the father to put down his establishment in any part to educate his children when they have incomes of their own. A father cannot, where his children have incomes of their own, be required to stint himself and alter his own mode of living for the purpose of giving them a maintenance or education suitable to their independent fortunes.

Another exception to the rule that a father must maintain his children, whether or not they possess property in their own right, is where not to allow maintenance would be a hardship upon the father's other children. The leading cases on this subject are those of *Hoste v. Pratt*<sup>2</sup> and *Andrews v. Partington*.<sup>3</sup> In the former case, the family of the father was a large and increasing one. By a will, upon which a hard construction was put by the Court, only the children born before a certain time were provided for, and in such will there was an express direction for maintenance. The Lord Chancellor, on the authority of *Andrews v. Partington*,<sup>4</sup> allowed maintenance, observing that the ability of the father must depend upon the number of his children, and that by refusing maintenance he should only be accumulating for the children who took the

Where  
other  
children  
unprovid-  
ed for.

<sup>1</sup> *Jervoise v. Silk*, G. Cooper 52.

<sup>2</sup> 3 Ves. 733.

<sup>3</sup> 3 B. C. C. 60. See also note (1) to 1 B. C. C. 386, Bell's edition.

<sup>4</sup> 3 B. C. C. 60; S. C. 2 Cox 223.

whole of the property, and diminishing the funds the father had for maintaining the children the Court was obliged to leave unprovided for.

Where  
trust for  
main-  
tenance in  
marriage  
settlement.

Where in an ante-nuptial settlement there are express trusts and provisions for the maintenance of the offspring of the proposed marriage, the father is entitled to have such trusts carried out. This is a matter of contract, and has apparently no reference to the father's ability to support the children. If the language of the settlement expresses merely a power to apply the income or any part thereof to the maintenance of the children, then the father is not entitled to maintenance.<sup>1</sup>

This doctrine will not be extended to the case of a voluntary post-nuptial settlement.<sup>2</sup>

Where gift  
to father  
for main-  
tenance.

Where a fund is expressly given to a father<sup>3</sup> for the maintenance of his children, he can, although of sufficient ability to support the child out of his other income, resort to that fund for the maintenance of the children.

A gift of this description is intended as a bounty to the father, and not to the child, and amounts to a legacy to the former; and where the fund is given to trustees or to the mother,<sup>4</sup> or to any other person,<sup>5</sup>

<sup>1</sup> *Per Kindersley, V. C.*, in *Ransome v. Burgess*, L. R. 3 Eq. 780.

<sup>2</sup> *Re Kerrison's Trusts*, L. R. 12 Eq. 422.

<sup>3</sup> *Andrews v. Partington*, 3 B. C. C. 60; S. C., 2 Cox. 223.

<sup>4</sup> *Hamley v. Gilbert*, Jac. 361; and *Thurston v. Essington*, note to Jac. 361.

<sup>5</sup> *Berkeley v. Swinburne*, 6 Sim. 613.

for the same purpose, the father's liability is relieved by the gift, and he can insist upon its being applied to the purpose for which it was given,—namely, the maintenance of the child.<sup>1</sup>

The obligation which the law imposes upon the father to maintain his children out of his own funds, even where they possess an income of their own, exists only where the father enjoys the care and custody of their persons and the superintendence of their education. Where the Court has in consequence of his misconduct interfered with the father's right to the custody of them, or where the father has himself waived that right in favour of some other person, the private fortunes of the infants must be applied to their maintenance, quite independently of the question whether the father is of sufficient ability to support them. Lord Eldon says in *Wellesley v. Duke of Beaufort*:<sup>2</sup> "I am not aware of any case in which the Court, where it has taken away from the father the care and custody of his children, has called in aid of their own means the property of the father;" and in the case of *Lyons v. Blenkin*,<sup>3</sup> which, as we saw in the fifth lecture, is the leading case on the question of the waiver by the father of his right to superintend the education

Obligation  
to maintain  
exists only  
where he  
has the  
custody.

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<sup>1</sup> See cases cited at p. 272, note (S) of Simpson on the Law of Infants; and see Macpherson on the Law of Infants, p. 245.

<sup>2</sup> 2 Russ. 29.

<sup>3</sup> Jac. 245.

of his children, maintenance was given out of the children's own fortunes.

Whether or not the father has lost the right to the custody of his children, either by waiver or by his misconduct, he still remains liable to the provisions contained in the Criminal Procedure Code<sup>1</sup> and the Presidency Magistrates' Act<sup>2</sup> with respect to their maintenance.

The principles upon which the Court acts in allowing maintenance to infants form a guide to trustees and the guardians of infants, as the maintenance of the infants under their charges in cases where no application has been made to the Court. It is, as we shall see hereafter, the duty of all guardians of infants to see that their wards are maintained and educated in a manner suitable to their position in life, and in making provision for this purpose, they must apply the principles which influence the Court when considering the question of an infant's maintenance.

We will now see out of what funds, to what amount, and for what period the Court will, in cases where it considers that recourse can properly be had to the infant's own funds for his maintenance, make such provision.

Funds from which maintenance will be given.

As a general rule, and apart from special circumstances, the income of the infant's estate should

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<sup>1</sup> Act X of 1872, sec. 536, see *ante*, p. 247.

<sup>2</sup> Act IV of 1877, sec. 234, see *ante*, p. 249.

alone be applied to his maintenance and education, and no encroachment should be made upon the principal. Trustees would rarely be allowed any payment made by them in excess of the income of the fund, but where the income is not a constant one, or the result disappoints a reasonable expectation of what that income would be, the trustees would be allowed what they had properly expended in view of the probable income of the estate.<sup>1</sup> In some cases trustees can employ the surplus accumulation of the income of the fund to the maintenance of the *cestui que trust*,<sup>2</sup> but their powers in this respect depend upon the construction of the instrument creating the trust. Where there is an express power in the instrument, the trustees can exercise it according to their discretion; but where, on the other hand, the instrument places the accumulations on the same footing as the capital fund, neither the trustees nor the Court can break in upon the accumulations, except in the same events as would justify them breaking in on the capital.<sup>3</sup>

Where there is more than one fund from which maintenance can be taken, the fund, the taking from which would be the least likely to diminish

Where  
more than  
one fund.

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<sup>1</sup> See Simpson on the Law of Infants, p. 276.

<sup>2</sup> See *Edwards v. Grove*, 2 D. F. & J. 210.

<sup>3</sup> See *Ex parte McKey*, 1 Ba. & B. 405.

the property which the minor would come into on attaining his majority, should be selected.<sup>1</sup>

Maintenance  
allowed out  
of capital.

There are certain cases where the Court will permit maintenance for a minor to be taken out of the capital of his property.<sup>2</sup> It is, however, never wise for the manager or guardian of the minor's estate or a trustee of property of which he is a *cestui que trust*, to entrench on the minor's capital without receiving the sanction of the Court,<sup>3</sup> as even if he were right in breaking in upon the capital he may have to bear the costs of subsequently obtaining the sanction of the Court, if there be a deficiency of assets.<sup>4</sup> It is not necessary that a suit should be brought, or a reference directed, for the purpose of obtaining such sanction.<sup>5</sup>

When property  
small.

Where the infant's property is very small, and the income of it insufficient to maintain the infant or to give him a suitable education, the Court will break in on the principal.<sup>6</sup> It will also do so where a sum of money is necessary for the purpose of setting the infant up in, or educating him for, a

For advancement.

<sup>1</sup> See Simpson on the Law of Infants, p. 294. Macpherson on the Law of Infants, p. 252.

<sup>2</sup> See Simpson on the Law of Infants, p. 282.

<sup>3</sup> It is, however, clear that, if an executor or trustee does without application what the Court would have approved, he will not be called to account, and forced to undo that, merely because it was done without application. See *Lee v. Brown*, 4 Vesey 369.

<sup>4</sup> *Robison v. Killey*, 30 Beav. 520.

<sup>5</sup> See *Ex parte Whitfield*, 2 Atk. 316; *Ex parte Chambers*, 1 R. & M. 580.

<sup>6</sup> See *Barlow v. Grant*, 1 Vern. 255.



business or profession, or otherwise advancing him in life.<sup>1</sup> Sums of money for the maintenance, education, or advancement of infants may also be raised out of their reversionary or contingent interests in property by means of a scheme of insurance or otherwise.<sup>2</sup> The Court would, however, be very reluctant to allow a sale of the infant's real property if it could possibly be avoided, and in preference to a sale would allow the money to be raised by mortgage of the property.

The amount of maintenance which the Court <sup>Amount allowed.</sup> will allow, or the guardian may with safety expend, for the maintenance of an infant depends upon the age, the rank, the fortune, and the expectations of the infant. It must be sufficient to give to the infant a maintenance and education suitable to the position which he will occupy on coming of age.

In awarding maintenance to an infant out of his own income, the Court will often grant a sum larger than is requisite for his own maintenance and education, when his father or mother is in indigent circumstances<sup>3</sup> or where his infant brothers or sisters are unprovided for.<sup>4</sup> The reason for this is, that the

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<sup>1</sup> See *Re Lane*, 17 Jur. 219; *Re Clark*, 17 Jur. 362; and cases collected in Simpson on the Law of Infants, p. 284 note (v); and see Macpherson on the Law of Infants, pp. 252, 255.

<sup>2</sup> See *Witte v. Palin*, L. R. 14 Eq. 251.

<sup>3</sup> *Allen v. Coster*, 1 Beav. 202; Macpherson on Infants, p. 250.

<sup>4</sup> *Wellesley v. Duke of Beaufort*, 2 Russ. 28; *Tweddell v. Tweddell*, Turn. & R. 13.

Court considers it for the benefit of the infant that his home should be made a comfortable one, and that his brothers and sisters should be brought up to such situations as reflect credit upon him.

Where the infant is married, provision must also be made out of his income for the support of his wife and children.<sup>1</sup>

Increase of allowance. Provision for special expenditure.

The Court has full power to increase the amount of maintenance allowed for the infant according as his needs require it, and additional provision may sometimes be granted for special expenditure, as for instance the marriage of the infant, or for the purpose of supporting charities, or keeping up the worship of the ancestral deity, or for the performance of the shrads of the infant's ancestors or of his relations; in fact, for the purpose of providing for all such proper obligations as the infant, were he an adult, would be morally bound to perform.

Past maintenance.

Maintenance can be given at any time after the infant has come into possession of the property, and past maintenance may also be given; but such past maintenance must have reference not to the time when the order is made, but to the time when the money was expended for the maintenance of the infant.<sup>2</sup>

<sup>1</sup> In the case of Mahomedans, where the wife is too young for matrimonial intercourse, she has no right of maintenance from her husband, whether she be living in his house or not. *In the matter of Khutija Bibi*, 5 B. L. R. 567.

<sup>2</sup> *Chaplin v. Chaplin*, 3 P. W. 368.

There is this difference between an allowance for future maintenance and an allowance for past maintenance, namely, that the latter can only be granted for the sums actually expended. It is not necessary, however, to take an account of the actual sums expended by the guardian, but an enquiry must be made as to the scale of expenditure upon which the infant was maintained, and an allowance can be granted upon that scale.<sup>1</sup>

As a general rule, the father of the infant will not be allowed anything in respect of past maintenance, but this may be done under special circumstances, as where he is in embarrassed circumstances, or has incurred a debt for maintenance, or is not of ability, having regard to other children unprovided for.<sup>2</sup> It may also, it seems, be given to the father if there is a trust for maintenance in the marriage settlement of the father and mother.<sup>3</sup>

With respect to other persons than the father, past maintenance can only be allowed where it was expended with the expectation of being recouped by the Court out of the infant's property;<sup>4</sup> but if trustees have a discretionary power to allow maintenance, past maintenance will be given, if they

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<sup>1</sup> *Bruin v. Knott*, 1 Ph. 572.

<sup>2</sup> See Simpson on the Law of Infants, p. 287.

<sup>3</sup> See *Mundy v. Earl Howe*, 4 B. C. C. 224.

<sup>4</sup> *Re Cottrell*, L. R. 12 Eq. 566; Simpson on the Law of Infants, p. 288. See *post*, Lecture IX, as to the powers of trustees to provide for the maintenance of their infant *cestui que trusts*.

have not exercised the power,<sup>1</sup> or if by mistake as to the amount of the income they have allowed only a small part of it.<sup>2</sup>

In addition to its power to make an allowance for the past maintenance of an infant, the Court can sanction the payment of any sums which have been expended for necessities supplied to the infant, and which can be claimed under the 68th section of the Indian Contract Act,<sup>3</sup> which provides that "If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

As a general rule, where no time is fixed by the instrument, if any, which provides for the infant's maintenance, the allowance will be given up to the time when the infant attains the age of majority.

Accumulations of maintenance.

With respect to unapplied accumulations of maintenance, where the infant is entitled to the whole income of the fund given for his maintenance, whether absolutely or till the happening of a certain event, such part of the income as is not applied for his maintenance belongs to him absolutely, or to his personal representative, in the case of his

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<sup>1</sup> *Maherly v. Turton*, 14 Ves., 499.

<sup>2</sup> *Stopford v. Canterbury*, 11 Sim., 99.

<sup>3</sup> Act IX of 1872, see *post*, Lecture VIII.

death; but where the infant is not entitled to the income of the fund, but only to maintenance there-out, the surplus follows the fate of the capital.<sup>1</sup>

The person entitled to receive the allowance made by the Court for the maintenance of an infant, will generally be the guardian of the infant's person; but the Court will not allow the money allowed for future maintenance to be paid over to any person who is not within its jurisdiction.<sup>2</sup> The Court will, however, in some cases, where the infant is residing outside the jurisdiction, appoint a guardian within the jurisdiction, *pro tanto*, to receive and remit the amount allowed for the infant's maintenance to a guardian resident outside of the jurisdiction.<sup>3</sup>

To whom  
allowance  
is to be  
paid.

The rights of infant wives to maintenance from their husbands are enforceable in the same way as the rights of adult wives to such maintenance.

Maintenance of  
infant  
wives.

The Criminal Procedure Code<sup>4</sup> and the Presidency Magistrates' Act<sup>5</sup> contain provisions for the maintenance of wives similar to those enacted by them for the maintenance of children unable to maintain themselves. Those Acts further provide that if the husband offers to maintain his wife on

<sup>1</sup> See cases cited in Simpson on the Law of Infants, p. 292, note (y).

<sup>2</sup> *Logan v. Fairlee*, Jac. 193.

<sup>3</sup> See *Coverdale v. Greenway*, Bign. 11.

<sup>4</sup> Act X of 1872, sec. 536, *ante*, p. 247.

<sup>5</sup> Act IV of 1877, sec. 234, *ante*, p. 249.

condition of her living with him, and his wife refuses to live with him, the Magistrate may consider any grounds of refusal stated by such wife, and may make the order for maintenance notwithstanding such offer, if he be satisfied that the husband is living in adultery, or that he has habitually treated his wife with cruelty.

No wife is entitled to receive an allowance from her husband under these provisions if she is living in adultery; or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

The Indian  
Divorce  
Act.

The Indian Divorce Act<sup>1</sup> gives to the Court, trying a suit instituted under that Act, power before decree, in its decree, or after decree upon application by petition, to provide for the custody, maintenance, and education of minor children,<sup>2</sup> the marriage of whose parents is the subject of the suit, and to direct proceedings to be taken for placing such children under the protection of the Court.

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<sup>1</sup> Act IX of 1869, secs. 41—44.

<sup>2</sup> "Minor children" means, in the case of sons of native fathers, boys who have not completed the age of sixteen years, and in the case of daughters of native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years. See sec. 5 of the Act.

## LECTURE VIII.

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### THE LIABILITIES OF INFANTS.

As an old writer observes<sup>1</sup> with respect to the incapacity of infants, "the law protects their persons, preserves their rights and estates, excuseth their laches, and assists them in their pleadings; the judges are their counsellors, the jury are their servants, and the law is their guardian."

Where, however, an infant is guilty of actual fraud, the Court will not afford to him that protection which his infancy would otherwise entitle him to.<sup>2</sup> And where an infant induces another person to believe that he is an adult, and to act on such belief, the infant cannot take advantage of the plea of infancy.<sup>3</sup>

Infants are after a certain age<sup>4</sup> liable for offences against the criminal law. They are also liable for torts and injuries of a private nature;<sup>5</sup> but with respect to contracts entered into by them, they are up to the time they attain majority under the special protection of the law, favoured

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<sup>1</sup> The Infants' Lawyer, Lond., 1712.

<sup>2</sup> *Stikeman v. Dawson*, 1 D. G. & S. 90; *Bristow v. Eastman*, 1 Esp. N. P. C. 172.

<sup>3</sup> *Wright v. Snow*, 2 D. G. & S. 321; see Act I of 1872, sec. 115.

<sup>4</sup> See *post*, p. 300.

<sup>5</sup> See *post*, p. 299.

in all things which are for their benefit, and not prejudiced by anything to their disadvantage.

The Indian  
Contract  
Act.

The Indian Contract Act<sup>1</sup> has made some alterations in the capacity of infants to enter into contracts.

Before the passing of that Act, the High Court, in suits on contracts, administered the Hindu, Mahomedan, or English laws according to the nationality of the defendant. The Mofussil Civil Courts, in cases to which the Hindu and Mahomedan laws were not applicable, were directed to proceed according to justice, equity, and good conscience.<sup>2</sup>

Power of  
infants to  
contract.

With respect to the power of minors to contract, the Hindu, Mahomedan, and English laws, as administered by the Courts in India, differed very little from each other.

Under the Hindu law, a minor seems to have had no power to contract under any circumstances;<sup>3</sup> but as Mr. Macpherson points out in his work on the Law of Contracts for British India,<sup>4</sup> the deed of

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<sup>1</sup> Act IX of 1872.

<sup>2</sup> As to the law administered by the Courts in India, see the *Secretary of State v. The Administrator-Genl. of Bengal*, 1 B. L. R. O. C. 87.

<sup>3</sup> 1 Strange's Hindu Law, 271; Menu, chap. viii, sloka 163; Vyavastha Darpana, p. 613; *Kallupnath Singh v. Kumlaput Jah*, 4 Sel. Rep. 339.

<sup>4</sup> P. 21; see *O'Donnell v. Moharajah Buddinath*, Morton 84, and *Boiddonath Dey v. Ramkishore Dey*, 13 W. R. C. R. 166.



a minor Hindu would probably be held not void, but only voidable if against his interest.

The Mahomedan law<sup>1</sup> and the English law, as administered in India, seem to have treated in exactly the same way contracts made by minors. Under those laws the general rule was, that contracts made by an infant are not binding on him, but that he might take advantage of such contracts and sue on them if they were for his benefit. Further, if on coming of age he should ratify the contract, it would be binding upon him.<sup>2</sup>

The Indian Contract Act,<sup>3</sup> which applies to all contracts made since the 1st of September, 1872, of whatever nationality the contracting parties may be,<sup>4</sup> provides<sup>5</sup> as follows:—

“All agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

The same Act<sup>6</sup> declares that “every person is competent to contract who is of the age of majority according to the law to which he is subject,

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<sup>1</sup> Macpherson on Contracts, p. 20 ; and Macnaghten's Principles of Mahomedan Law, pp. 43 & 63.

<sup>2</sup> See *post*, Lecture XI, as to ratification by an infant.

<sup>3</sup> Act IX of 1872.

<sup>4</sup> See *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R. 76.

<sup>5</sup> Sec. 10.

<sup>6</sup> Sec. 11.

and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

The interpretation clause<sup>1</sup> of the Indian Contract Act gives the following definitions:—

"(g.) An agreement not enforceable by law is said to be void :

"(h.) An agreement enforceable by law is a contract :

"(i.) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."

If these provisions are closely looked at, it will be seen that it does not follow from them that an agreement to which an infant is a party is void, and it is quite consistent with these provisions that such agreement is a voidable contract; that is to say, enforceable at the option of the infant (or those acting on his behalf), but not at the option of the other party to the agreement.

If the Indian Contract Act is capable of this construction, the law as to the capacity of infants to enter into binding contracts remains as it was before the passing of that Act, with the exception of some special provisions with respect to minor partners<sup>2</sup> and agents,<sup>3</sup> and with respect to necessities supplied to infants.<sup>4</sup>

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<sup>1</sup> Sec. 2.

<sup>2</sup> See *post*, p. 288.

<sup>3</sup> See *post*, p. 287, 288.

<sup>4</sup> See *post*, p. 276.

The Indian Contract Act is not exhaustive of the law of contracts,<sup>1</sup> and as that Act does not expressly render void contracts made by infants, it may be taken that the legislature did not intend to make any alteration in the existing law in this respect, and that the general rule of law with respect to the capacity of infants to enter into contracts is that any such contract is voidable by the infant, and only enforceable against him, if ratified by him after he has come of age.

This question is by no means free from doubt. Mr. Macrae, in his work on the Indian Contract Act,<sup>2</sup> considers that, under that Act, all contracts made by a minor, with the single exception of those contracts which relate to necessities supplied for his use,<sup>3</sup> are absolutely void, and are not enforceable by law, even though ratified by the minor on coming of age.

Whether or not a contract entered into by a minor be absolutely void, there is no doubt that where a minor has acted upon a contract, or has performed his share thereof, the person making the contract with the minor would be required to recompense the minor for such part of the contract as had been performed by him, and thus to place the minor in the position in which he would have been had

Where  
contract  
has been  
acted upon.

<sup>1</sup> *Per* Pontifex, J., in *Madhub Chunder Foramanick v. Rajcoomar Doss*, 14 B. L. R. 78.

<sup>2</sup> P. 15.

<sup>3</sup> See Act IX of 1872, sec. 68, *post*, p. 276

the contract not been entered into. A minor can also recover for work or labour done by him, or for money paid by him.

The 70th section of the Indian Contract Act,<sup>1</sup> which seems to be equally applicable to the case of a minor or an adult, provides that "where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Even if an agreement entered into by an infant be not void, he cannot sue for specific performance of it.<sup>2</sup>

Neces-  
saries.

Apart from the general question as to the capacity of an infant to enter into a contract, a person supplying necessities to an infant can recover against the infant's estate.

The 68th section of the Indian Contract Act<sup>1</sup> provides that—"If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." This rule is in accordance with the English law

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<sup>1</sup> Act IX of 1872.

<sup>2</sup> *Flight v. Bolland*, 4 Russ. 298, see Act I of 1877, sec. 4, para. (a).

and the law which prevailed in Bengal before the passing of the Indian Contract Act.

Necessaries, suited to a person's condition in life, include such things as are reasonably required for the nourishment, clothing, lodging, education, health, and decent behaviour and appearance of the infant according to his station, degree and fortune.<sup>1</sup>

As a general rule, articles, which are purely ornamental or luxurious, cannot be considered necessities; but they may sometimes be so, where they are suited to the infant's condition of life.

It is a mixed question of law and of fact whether particular articles are suitable to a particular infant's condition in life. It is a question of law whether such articles could possibly be considered necessities. It is a question of fact whether such articles are necessities in the particular case.<sup>2</sup>

What amount to necessities within the meaning of the 68th section of the Contract Act depends entirely upon the circumstances of each particular case, and the question is not whether the expenditure is one which the infant could not properly incur. There is nothing to prevent an infant from indulging in luxury, if he has the money to pay, and pays for it. But the question is whether it is

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<sup>1</sup> See judgment of Bramwell, B., in *Ryder v. Wombwell*, 37 L. J. Ex. 50; S. C. on appeal, L. R. 4 Ex. 32; and 38 L. J. Ex. 8.

<sup>2</sup> *Ryder v. Wombwell*, L. R. 4 Ex. 38; S. C. 38 L. J. Ex. 10. As to what articles have been held to be necessities, see Macpherson on Infants, pp. 499—501; and Simpson on Infants, pp. 86—88.

so necessary for the purpose of maintaining himself in his station that he should have the particular articles, as to bring them within the exception under which an infant may pledge his credit for them as necessities.<sup>1</sup>

What are  
neces-  
saries?

The surrounding circumstances of each particular case furnish the only ground for the solution of this question. The term "necessaries" primarily implies only suitable food, drink, clothing, lodging, instruction, and education for the infant in accordance with the position in life occupied by the infant, and the fortune enjoyed by him, and articles purely of ornament and luxury could not be included in the term. But articles may be necessities suitable to the degree in life and condition of the infant, even though of an ornamental or luxurious character, where the infant's fortune or prospects would justify their being so considered.<sup>2</sup>

In some cases special circumstances might bring under the term "necessaries" articles which generally could not be considered as such. For instance, where a doctor has ordered horse exercise for an infant, the hire or even the purchase of a horse may be necessary.<sup>3</sup> Presents to be given by the infant may in some cases be considered necessities, as where the infant was in a good position and bought the

<sup>1</sup> *Ryder v. Wombwell*, L. R. 4 Ex. 39; S. C. 38 L. J. Ex. 10.

<sup>2</sup> *Peters v. Fleming*, 6 M. & W. 46; see Simpson on Infants, p. 87.

<sup>3</sup> *Hart v. Prater*, 1 Jur. 623.

articles for the purpose of giving them to his intended bride;<sup>1</sup> and where the infant has incurred necessary legal expenses, as for making a marriage settlement,<sup>2</sup> those expenses can be recovered from his estate.

It has been held that the payment of money to release an infant from arrest,<sup>3</sup> or to save him from ejectment for nonpayment of rent,<sup>4</sup> can be recovered as necessities.

In many cases expenditure incurred obviously for the benefit of the infant, although not included in the ordinary use of the term "necessaries," would bind the infant's estate. For instance, the costs, properly incurred, of the next friend or guardian *ad litem* of the infant in a suit,<sup>5</sup> the marriage expenses of the infant, the funeral ceremonies of the wife, husband, or children of the infant,<sup>6</sup> and the performance of the *shrads* of the ancestors of the infant, or such religious ceremonies as the infant, if he had been an adult, would be morally bound to perform.

The 68th section of the Indian Contract Act includes as necessities binding the infant's estate, necessities supplied to persons whom the infant is legally bound to support.

Necessaries  
supplied to  
wife and  
children of  
infant.

Illustration (b) to that section shows that the term "any one whom he is legally bound to support"

<sup>1</sup> *Jenner v. Walker*, 19 L. T. N. S. 398.

<sup>2</sup> *Helps. v. Clayton*, 10 Jur. N. S. 1184.

<sup>3</sup> *Clark v. Leslie*, 5 Esp. 28.

<sup>4</sup> *Ex parte McKey*, 1 Ba. & B. 405.

<sup>5</sup> *Collins v. Brook*, 5 H. & N. 708.

<sup>6</sup> *Chapple v. Cooper*, 13 M. & W. 259, 260.

includes the wife and children of the infant, and it would apparently include no one else.

Necessaries  
supplied to  
husband of  
female  
infant.

Though the Contract Act<sup>1</sup> contemplates the estate of an infant husband being liable for necessities supplied to his wife, it does not contemplate any possibility of the converse case,—namely, the estate of an infant wife being liable for necessities supplied to her husband. A wife is not legally bound in any sense to support her husband; but the English rule of law, that the interest of a personal connection is sometimes regarded in law as that of the individual himself,<sup>2</sup> might, even in this country, render the estate of an infant wife liable for necessities supplied to her husband, where her husband has no means of support whatever.

This rule is in no way based upon the rights which a husband by English law, but not by Indian law, possesses in his wife's property.

In one English case<sup>3</sup> an infant widow was held liable upon her contract for the funeral of her husband, who had left no property to be administered. In that case Alderson, B., said :—"Now the law permits an infant to make a valid contract of marriage, and all necessities furnished to those with whom he becomes one person by or through the contract of marriage are, in point of law, ne-

<sup>1</sup> IX of 1872.

<sup>2</sup> See Broom's Legal Maxims, 5th edn., p. 533.

<sup>3</sup> *Chapple v. Cooper*, 13 M. & W. 259, 260.



cessaries to the infant himself. Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If then this be so, the decent Christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal advantage, and reasonably necessary to him, and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children, and then the question arises whether an infant widow is in a similar situation. It may be said that she is not, because, during the coverture, she is incapable of contracting,<sup>1</sup> and after the death of the husband the relation of marriage has ceased. But we think this is not so.

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<sup>1</sup> The English rules with respect to the incapacity of married women to enter into contracts apply to persons domiciled in India, who are subject to the English law, and were married before the 1st of January, 1866; see Act X of 1865, secs. 4 and 331.

“In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation, which gives validity to the contract, is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is a contract for his own personal benefit; and if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract, and her infancy is, for the above reasons, no defence if the contract be for her personal benefit.

“It may be observed that as the ground of our decision arises out of the infant’s previous contract of marriage, it will not follow from it that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative.”

The Court did not base their decision in this case in any way upon the rights of a husband according to the then English law over the property of his wife, but simply on the ‘contract of marriage, and the rule arising therefrom that *persona conjuncta æquiparatur interesse proprio*, and therefore the doctrine contained in Baron Alderson’s judgment would apparently have equal weight in this country.

Whether or not necessities supplied to the husband

can be considered a charge upon the estate of the infant wife, there is no doubt that the Court, in fixing maintenance for an infant wife, will take into consideration the pecuniary condition of the husband, and in cases where the husband is destitute of means of support, will increase the wife's maintenance accordingly.<sup>1</sup>

There is another question left open by section 68 of the Indian Contract Act,—namely, whether the person supplying the infant with necessaries is entitled to be reimbursed where the infant at the time of the supply already possessed a sufficient quantity of such necessaries, and whether in case the infant has such sufficient quantity, ignorance of this fact on the part of the person supplying an additional quantity to the infant would affect the question of liability.

How far  
quantity of  
necessaries  
supplied  
affects lia-  
bility of  
infant.

Things, which in a small and reasonably sufficient quantity are necessaries, cease to be such, when supplied in a quantity over and above what is sufficient, and they equally cease to be such whether they are supplied by one tradesman only, or by a number of different tradesmen.

The rule of law, that an infant can be sued on a contract for necessaries only, is always construed for the benefit of the infant and not for that of the tradesman. As Bramwell, B., said in *Ryder v.*

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<sup>1</sup> See *ante*, Lecture VII, p. 266.

*Wombwell* :<sup>1</sup>—"It is not a law for the indemnity and defence of the infant who is sued merely, it is a law to deter people from trusting infants, and so save the latter from the consequences of the improvidence and inexperience natural to their age ; an improvidence which would lead them into loss, though all their dealings were with honest people ; an inexperience which causes them to be no match with rogues." That being so, it is the duty of a tradesman dealing on credit with an infant to stand on his guard, and make every possible enquiry. Even then he supplies the goods at his own risk, as it is for him to consider what things, and what amount of such things, the infant is actually in need of for the purpose of keeping up his position in life.<sup>2</sup>

Ryder v.  
Wombwell.

With respect to the second part of the question, there is some contradiction in the decisions. The last case in which this point was raised was that of *Ryder v. Wombwell*.<sup>3</sup> That was a suit by a tradesman against an infant, entitled to a large income on attaining his majority, for jewellery supplied to him, as the plaintiff alleged, suitable to the infant's position in life. At the close of the plaintiff's case, the defendant's counsel offered evidence that the defendant was already supplied with similar articles

<sup>1</sup> 37 L. J. Ex. at p. 51.

<sup>2</sup> See *Story v. Pery*, 4 C. & P. 527 ; *Brayshaw v. Eaton*, 7 Scott 185, *per* Bosanquet, J.

<sup>3</sup> 37 L. J. Ex. 50 ; S. C. on appeal, L. R. 4 Ex. 32 ; and 38 L. J. Ex. 8.

of jewellery to a large amount, so as to render any further supply unnecessary; but it being admitted that the plaintiff was not aware of this, the Judge rejected this evidence.

The Court of Exchequer, with the exception of Branwell, B., who dissented from the rest of the Court, upheld the rejection of the evidence. In appeal the Exchequer Chamber<sup>1</sup> decided the case upon other grounds. Mr. Justice Willes, in delivering the judgment of that Court, said:<sup>2</sup> "It becomes, therefore, unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are found by no means uniform. In *Bainbridge v. Pickering*,<sup>3</sup> the Court of Common Pleas seems to have acted on a principle which would make the evidence admissible. In *Brayshaw v. Eaton*,<sup>4</sup> Bosanquet, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn, J., and Mellor, J.) acted in *Foster v. Redgrave*.<sup>5</sup> There is much to be urged in support of the view taken by the majority of the Court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the Court before which it comes

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<sup>1</sup> L. R. 4 Ex. 32; S. C. 38 L. J. Ex. 8.

<sup>2</sup> L. R. 4 Ex. at p. 42; and 38 L. J. Ex. at p. 12.

<sup>3</sup> 2 Wm. Bl. 1325.

<sup>4</sup> 7 Scott 183.

<sup>5</sup> L. R. 4 Exch., p. 35 note (8).

must determine it on the balance of authority, and on principle, without being fettered by a decision of this Court."

Inasmuch as this law is one made for the benefit of the infant, and not for the benefit of the tradesman, and as the infant is only bound by necessaries, can it be said that the ignorance of the tradesman renders those things necessaries which would not otherwise be so? Where the articles are supplied by one tradesman in an excessive quantity there is no doubt that they cannot be considered necessaries. Do they become necessaries, because they are supplied by different tradesmen? As Baron Bramwell put it in *Ryder v. Wombwell*.<sup>1</sup> "Suppose a baker delivered one hundred loaves daily to an infant, who could only consume one, would he be liable for the price of the other ninety-nine? Certainly not, because they were not necessaries. But what difference does it make on this question that they are supplied by one baker or a hundred?"

It has been held that an infant is equally liable for necessaries supplied to him, whether or not he has an allowance or income, from which he might have purchased such necessaries.<sup>2</sup>

Money supplied to infant for purchase of necessaries. The 68th section of the Contract Act, as we have seen, confines the liability of the minor's estate

<sup>1</sup> 37 L. J. Ex. 51.

<sup>2</sup> *Burghast v. Hall*, 4 M. & W. 727.

to the case where he has been supplied by another person with necessities suited to his condition in life, and does not contemplate the case of an infant being supplied with money for the purchase of necessities, and purchasing such necessities with such money. According to English doctrines of equity, money so supplied to the infant follows exactly the same principle as necessities actually supplied.<sup>1</sup> This, however, applies only where the infant has actually expended the money in necessities, as in that case only the person lending the money stands in the place of the person supplying the necessities.

Again, where a person pays money for necessities, which have been supplied to an infant, he would be able to recover that money from the infant's estate under the 68th section of the Indian Contract Act. Money paid for necessities supplied.

The 68th section of the Indian Contract Act imposes a liability upon the infant's estate entirely independent of any contract by the infant; and it, therefore, follows that a person who obtains from an infant a bond, account stated, or bill of exchange in relation to necessities supplied, is not placed thereby in any better position.

An infant cannot appoint an agent<sup>2</sup> or attorney.<sup>3</sup> Contract of agency.

<sup>1</sup> *Marlow v. Pitfield*, 1 P. Wm. 558.

<sup>2</sup> Act IX of 1872, sec. 183.

<sup>3</sup> *Radhanath Bose v. Suttoprosonno Ghose*, 2 Ind. Jur. 269; *Oliver v. Woodroffe*, 4 M. & W. 650.

An infant can be appointed an agent, but he is not responsible to his principal for his acts in that behalf. The principal is, however, bound by the acts of his minor agent to the same extent as if that agent had attained the age of majority, and was of full capacity.<sup>1</sup>

Contract of  
partner-  
ship.

With respect to contracts of partnership entered into by minors, the Indian Contract Act<sup>2</sup> provides as follows :—

“ *Section 247.*—A person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm ; but the share of such minor in the property of the firm is liable for the obligations of the firm.

*Section 248.*—A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.”<sup>3</sup>

The Act does not require private notices to the creditors of the firm, and, moreover, does not

<sup>1</sup> Act IX of 1872, sec. 184.

<sup>2</sup> Act IX of 1872.

<sup>3</sup> As to the law on this subject before the passing of the Indian Contract Act, see *Prosunno Kumar Bural v. Chowdree Sajudoor Ruhman*, 9 S. D. A. 525.



specify in what way public notice is to be given. Presumably, the proper notice would be by advertisements in the Gazettes or Newspapers of the place where the business is carried on. Where there are no Gazettes or Newspapers at that place, it is very difficult to say what kind of public notice ought to be given.

As a trading partnership is a consentient contract, it is doubtful whether an infant of tender years<sup>1</sup> can be admitted to the same, or in any way become liable for the obligations of the same.

An infant can bind himself by a contract of service, provided it be not one manifestly to his disadvantage, but he may avoid such contract after he attains the age of majority.<sup>2</sup> Any native of India, who is above the age of sixteen years, may enter into an engagement or contract under the provisions of the Labor Districts Emigration Act.<sup>3</sup>

We now come to the capacity of infants to enter into a valid contract of marriage. Contract of marriage.

The capacity of an infant to enter into a marriage contract proceeds upon principles different to those which govern his capacity to enter into other contracts.

The law in this respect varies according to the religion of the persons contracting marriage; and

<sup>1</sup> See *Petum Doss v. Ramdhoun Doss*, Taylor, 279.

<sup>2</sup> See No. 65 of 4th schedule of Act X of 1877.

<sup>3</sup> Act VII (B.C.) of 1873, sec. 6.

it must be remembered that in all questions as to capacity to enter into a marriage contract, the age of majority is not determined by the Indian Majority Act, but by the law in force before the passing of that Act.<sup>1</sup>

Mahom-  
medan  
Law.

According to Mahomedan law, the consent of the guardian<sup>2</sup> is indispensable to the validity of a marriage.<sup>3</sup>

In a case<sup>4</sup> decided by the Bengal Sudder Court, it was held that if a boy and girl, both minors, in the presence of witnesses enter into a marriage contract as their own act, and the husband acknowledge himself indebted so many thousand rupees to the wife, and the guardians of the minors, being also present, give their consent either at first or afterwards, or if the minors, on coming of age, confirm the agreement, in either case the marriage is valid ; but that if the guardians were not present at the marriage, and after hearing of it did not give their consent, and if the minors on coming of age do not acknowledge the marriage as valid, then it is void.

There seems to be some slight difference between

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<sup>1</sup> Act IX of 1875, sec. 2 ; *ante*, Lecture I.

<sup>2</sup> As to what relations are guardians for marriage under the Mahomedan law, see *ante*, Lecture II.

<sup>3</sup> See Macnaghten's Precedents of Mahomedan Law, chap. vi, case 15 and case 18 note ; Principles, chap. vii, princ. 16.

<sup>4</sup> *Musst. Kureemoonissa v. Ruheem Ali*, 2 Sel. Rep. 233.

the Soonee and Sheeah laws with respect to the marriages of infants.<sup>1</sup>

Under the Soonee law a marriage of a minor is complete, unless avoided by the expressed dissent of the minor on attaining the age of puberty. Soonee Law.

Under the law of the Sheeah sect, a marriage entered into on behalf of an infant by the father or grandfather of such infant is complete, and cannot be avoided at any time by the infant ; but a marriage contracted for by any other guardian requires the assent of the minor, after attaining puberty and mature understanding, to perfect it, and there must be evidence either of express assent or of facts from which it may be presumed. Delay in repudiating the marriage would be evidence of acquiescence.<sup>2</sup> Sheeah Law.

In the case of *Newab Mulka Jehan Sahiba v. Mahomed Ushkurree Khan*<sup>3</sup> the Privy Council said :—" The law of the Soonees appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Sheeahs seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her

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<sup>1</sup> See *Newab Mulka Jehan Sahiba v. Mahomed Ushkurree Khan*, 26 W. R. C. R. 26.

<sup>2</sup> See Baillie's Dig, Part II, chap. 1, sec. 2, pp. 9 and 10, and chap. IV, p. 294 ; Macnaghten's Principles of Mahomedan Law, chap. vii, princ. 18.

<sup>3</sup> 26 W. R. C. R. 26.

assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage, when it is brought to her notice and is present to her understanding. It appears by the extracts from Baillie, Part II,<sup>1</sup> that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her ; but a woman, who is not, must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Sheeah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shown that the question of the marriage was distinctly propounded to the girl. They have no doubt that may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognised and ratified, although no distinct assent could be proved."

If a minor desires to annul a marriage which has been entered into by him or her or on his or her

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<sup>1</sup> Chap. i, sec. 2, pp. 9 and 10 ; chap. iv, p. 294.

behalf, he or she must do so immediately after attaining the age of puberty. If a minor continues to live with her husband after that age, she loses her right to annul the marriage.

An infant's guardians can apparently avoid a marriage which has been entered into by the infant without their consent ; but in the case of a female minor who has attained the age of puberty, they can only do so, if the marriage be an unequal one.<sup>1</sup>

A guardian cannot interfere with the marriage of his ward after she has borne a child, but he can cause the marriage to be set aside at any time before the birth of a child.<sup>2</sup>

After a girl has attained the age of fifteen years, there seems to be an irresistible presumption under the Mahomedan law that she has attained the age of puberty. If she be below the age of nine years, there seems to be an equally irresistible presumption that she has not attained puberty.<sup>3</sup> If the girl be between nine and fifteen years of age, her own statement with respect to her puberty must be taken as conclusive. If on being asked she is silent, she must be taken as not having attained the

The age of puberty.

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<sup>1</sup> Macnaghten's Principles of Mahomedan Law, chap. vii, princ. 15 ; and Precedents, chap. vi, cases 15 and 17.

<sup>2</sup> Macnaghten's Principles of Mahomedan Law, chap. vii, princ. 17 ; and Precedents, chap. vi, case 17 note.

<sup>3</sup> See *ante*, Lecture I.

age of puberty.<sup>1</sup> In the absence of evidence to the contrary, a Mahomedan girl who has attained the age of nine years must be taken as having attained the age of puberty.<sup>2</sup>

It has been held that according to Mahommedan law a minor who is adolescent, can legally contract for dower.<sup>3</sup>

Divorce. An infant cannot under Mahommedan law effect a valid divorce.<sup>4</sup>

Hindu Law. The Hindu law seems to treat as indissoluble a marriage which has been properly contracted by the guardian of the infant during his minority.<sup>5</sup> It has been held<sup>6</sup> that under the Hindu law the want of a guardian's consent will not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies.

Christians. By the Indian Christian Marriage Act, 1872,<sup>7</sup> which consolidates the law relating to the solemnization in India of the marriages of persons professing the Christian religion, it is provided<sup>8</sup> that when one of the persons intending marriage is a minor

<sup>1</sup> Macnaghten's Precedents of Mahomedan Law, chap. vi, cases 17 and 18, and App. Tit. Infant 1, 1 Morley's Dig. Tit. Infant.

<sup>2</sup> *Newab Mulku Jehan Suhiba v. Mahomed Ushkurree Khan*, 26 W. R. C. R. 26.

<sup>3</sup> *Abdul Karim v. Mussamut Fazilatunnissa*, 5 Sel. R. 75.

<sup>4</sup> See Tagore Law Lectures for 1873, p. 389. Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 12.

<sup>5</sup> *Kaleeram Dokanee v. Mussamut Gendhenee*, 23 W. R. C. R. 178.

<sup>6</sup> *Modhoosoodum Mookerjee v. Jadub Chunder Banerjee*, 3 W. R. C. R. 194.

<sup>7</sup> Act XV of 1872.

<sup>8</sup> Sec. 15.

(that is to say, a person who is under the age of 21 years and is not a widower or widow<sup>1</sup>), every minister receiving the notice required by the Act to be given by one of the persons intending marriage shall send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar ; and the 16th section provides that "the Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed."

The same Act provides<sup>2</sup> that the father (if living) of any minor, or if the father be dead, the guardian of the person of such minor, and in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and no marriage can be solemnized without such consent, unless no person authorized to give such consent be resident in India.<sup>3</sup>

The person whose consent is so required may<sup>4</sup> prohibit the issue of the certificate, which the Act<sup>5</sup> Guardian may prohibit issue of certificate.

<sup>1</sup> Sec. 3.<sup>2</sup> Sec. 19.<sup>3</sup> Sec. 18.<sup>4</sup> Sec. 20.<sup>5</sup> Sec. 17.

makes a condition precedent to the solemnization of a marriage, and on the receipt of such notice of prohibition the minister shall not issue his certificate, and shall not solemnize the said marriage until he has examined into the matter of the prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.<sup>1</sup>

When either of the persons intending marriage is a minor, and the minister is not satisfied that the consent of the person whose consent to such marriage is required has been obtained, such minister shall not issue such certificate required by the Act until the expiration of fourteen days after the receipt by him of the notice of marriage.<sup>2</sup>

The absence of the consent of the person entitled to consent does not render the marriage void.<sup>3</sup>

Native  
Christians.

No consent is necessary in the case of the marriage of Native Christians over the age of eighteen years.<sup>4</sup>

Parsees.

The Parsee Marriage Act requires the consent of the father or guardian to the marriage of persons under the age of twenty-one years,<sup>5</sup> and makes a marriage without such consent invalid.<sup>6</sup>

<sup>1</sup> Sec. 21.

<sup>2</sup> Sec. 23.

<sup>3</sup> *R. v. Birmingham*, 8 B. & C. 29.

<sup>4</sup> Act XV of 1872, sec. 60.

<sup>5</sup> Act XV of 1865, secs. 5 & 6.

<sup>6</sup> Sec. 3.



Act III of 1872, which provides a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Parsee, Buddhist, Sikh or Jain religion, does not permit the marriage of any person under the age of twenty-one years without the consent of his or her father or guardian, and even with such consent it does not permit the marriage of a man under eighteen, or a woman under fourteen years of age.<sup>1</sup>

Any person may object to any marriage under this Act on the ground that the parties have not reached the prescribed age, or that they have not received the necessary consent to their marriage. The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.<sup>2</sup>

The Act further provides: "*Section 7.*—On receipt of such notice of objection the Registrar shall not solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court."

The person objecting to the intended marriage may file a suit in any Civil Court having local juris-

<sup>1</sup> See sec. 2.

<sup>2</sup> Sec. 6.

diction (other than a Court of Small Causes) for a declaratory decree, declaring that the marriage would contravene the conditions prescribed by the Act.<sup>1</sup>

If the objection be not reasonable and *bond fide*, the Court, in which the suit is filed, may inflict on the objector a fine not exceeding one thousand rupees.<sup>2</sup>

Uncon-  
scionable  
bargains  
with per-  
sons who  
have re-  
cently at-  
tained  
majority.

The protection which the law affords to infants in respect of contracts entered into by them, is in some cases extended to persons who have recently attained the legal age of majority.

Where an unconscionable bargain is made with a young man who has just attained the age of majority, the Court will set aside the transaction.

In one case,<sup>3</sup> where a young man who was possessed of property, and who had attained his majority one year and one or two months before the transaction, borrowed a sum of money from a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent per annum, the High Court at Calcutta held, that the money-lender was only entitled to a decree for the amount actually advanced by him with interest at 6 per cent.

With reference to the protection thus afforded by the Court, Lord Selborne, in the case of the

<sup>1</sup> Sec. 7.

<sup>2</sup> Sec. 8.

<sup>3</sup> *Mothoormohun Roy v. Soorendro Narain Deb*, 1 I. L. R. Calc. 120. See also *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484.

*Earl of Aylesford v. Morris*,<sup>1</sup> said: "It is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.

"In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion. The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class,) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters without either the will or the power to take care of himself and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this."

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<sup>1</sup> L. R. 8 Ch. App. 491.

The liability of infants for torts committed by them.

An infant is liable in respect of all actionable wrongs, independent of contract, committed by him. He is liable to a suit for damages for assault, false imprisonment, libel, slander,<sup>1</sup> seduction, detention of goods, trespass to the goods, lands or person of another, conversion or detention of moveable property, negligence, or for any fraud committed by him.<sup>2</sup>

Where, however, the suit, though in the form of an action for tort, is really grounded on contract, he is liable only to the same extent as if the suit had been framed as on a contract.<sup>3</sup> Similarly, where the suit is substantially founded on a tort, though it is in the form of a suit on a contract, the infant is liable.<sup>4</sup>

The liability of infants for offences against the criminal law. Infants under seven.

The liability of an infant to punishment for offences committed by him against the criminal law varies according to his age.

Up to the age of seven years an infant is absolutely free from all responsibility to the criminal law, and nothing done by him while under that age renders him liable to the penalties imposed by that law.<sup>5</sup>

Infants more than seven, and less than twelve.

Between the ages of seven and twelve the responsibility of an infant depends upon the maturity

<sup>1</sup> *Jennings v. Rundall*, 8 T. R. 335.

<sup>2</sup> *Bristow v. Eastman*, 1 Esp. N. P. C. 172.

<sup>3</sup> *Jennings v. Rundall*, 8 T. R. 335.

<sup>4</sup> *Bristow v. Eastman*, 1 Esp. N. P. C. 172.

<sup>5</sup> Act XLV of 1860, sec. 82.

of his judgment. The eighty-third section of the Indian Penal Code<sup>1</sup> provides as follows:—

“Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

It has been held,<sup>2</sup> that when a child between the ages of seven and twelve is charged with an offence, it is for the defence to show that the child has not attained sufficient maturity of understanding. A different interpretation is, however, given to this section by Messrs. Morgan and Macpherson in their edition of the Indian Penal Code.<sup>3</sup> They there say: “It seems that the age of the accused being once established, and the case so far brought within the exception, the Court cannot convict, until the prosecution has proved such maturity of understanding as makes the accused criminally responsible in the particular case. The degree of proof to be required may depend on the age; for there is a wide difference between the cases of two children, one of whom is a day short of twelve, and the other a day over seven years.” This latter interpretation is in accordance with the English law.<sup>4</sup>

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<sup>1</sup> Act XLV of 1860.

<sup>2</sup> *The Queen v. Lakhini Agradamini*, 22 W. R. Cr. R. 27.

<sup>3</sup> P. 60.

<sup>4</sup> Archbold's Pleading and Evid. in Crim. Cases, 17th edn., p. 16; Broom's Legal Maxims, 5th edn., p. 316.

To render an infant between the ages of seven and twelve criminally responsible, it is not necessary that he should know the penal consequences of his offence; but he must be capable of knowing the natural consequences which flow from his act, and also the fact that the committal of the act is an offence punished by the criminal law, or rather that the act which he was doing was wrong.<sup>1</sup>

The manner of committing the offence, or the intelligence shown by the offender in concealing all trace of the crime, will often be sufficient to render the infant criminally responsible for the offence.<sup>2</sup> The defence set up by the child and his demeanour at the trial will often also be material.<sup>3</sup>

Infant  
over twelve  
years of  
age.

After he has attained the age of twelve years, an infant is liable to the penalties of the criminal law to the same extent as an adult.

Infant  
offender  
may be  
sent to re-  
formatory.

A person under the age of sixteen years who is sentenced by any Criminal Court, to which the Criminal Procedure Code is applicable,<sup>4</sup> or by the High Court,<sup>5</sup> to imprisonment for any offence, may be confined in a reformatory instead of being imprisoned in the criminal jail.

<sup>1</sup> See *Queen v. Lukhini Agradanini*, 22 W. R. Cr. R. 27.

<sup>2</sup> *Queen v. Mussamut Aimona*, 1 W. R. Cr. R. 43; Mayne's Indian Penal Code, 9th edn., p. 66.

<sup>3</sup> *Queen v. Lukhini Agradanini*, 22 W. R. Cr. R. 27.

<sup>4</sup> Act X of 1872, sec. 318.

<sup>5</sup> Act X of 1875, sec. 112.

## LECTURE IX.

### THE DUTIES AND POWERS OF GUARDIANS.

THE duties of a guardian depend upon whether he has charge of the person or of the estate of his ward.

It is the duty of the guardian of an infant's person to make proper provision for the maintenance, lodging, clothing, and education of the ward, according to the position which he will occupy in life on his attainment of the age of majority.

Duties of  
guardian  
of person.

The duties of the guardian of an infant's estate can be best summed up in the terms of the agreement executed by managers of estates under the Court of Wards.<sup>1</sup> He must manage the estate diligently and faithfully for the minor proprietor, must use every means in his power to improve the same for the ward's benefit, and must act in every respect for the interest of such ward in like manner as if the estate were his own.

Duties of  
guardian  
of estate.

The guardian of an infant's person has, whether he be a natural guardian, or a testamentary guardian, or a guardian appointed by a Civil Court or by the Court of Wards, an undoubted right to the custody of the person of his ward,<sup>2</sup> subject of course to the

Guardian  
of person.

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<sup>1</sup> Act IV (B.C.) of 1870, Sched. A.

<sup>2</sup> See *In re Andrews*, 8 L. R. Q. B. 153.

powers of the Courts to interfere with that possession.<sup>1</sup> Apparently, a guardian may use a certain amount of force to obtain or retain possession of his ward's person where such force does not amount to a breach of the peace.<sup>2</sup>

The main-  
tenance of  
the infant.

The guardian of an infant must, out of the income of his ward's estate, provide a proper maintenance for such ward,—that is to say, he must see that the infant is clothed, housed, and fed in a manner suitable to his position in life, and to the fortune which he is to enjoy on attaining the age of majority; and, if he be sued for an account, the guardian will be allowed all sums properly expended for the protection and safety, or for the maintenance and support, of his ward.<sup>3</sup>

Where the care of the infant's person and that of his estate are in different hands, it is the duty of the guardian of his estate to furnish to the guardian of his person what is requisite for the purpose of the infant's maintenance.

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<sup>1</sup> See Lectures IV, V, and VI, *ante*. In the sixth lecture the summary powers of the Courts in India to provide for the custody of minors are considered. Where the fact of a person being guardian is disputed, as for instance, where he claims to be guardian under a will, and the *factum* of the will is denied, the summary powers of the High Court cannot be very conveniently exercised. The Court may, however, make an enquiry, or order a reference to determine the question as to the right of guardianship of the infant. See *In re Andrews*, 8 L. R. Q. B. 160.

<sup>2</sup> See *Ex parte Hopkins*, 3 P. Wms. 154; *ante*, pp. 236-7; and Forsyth on the Custody of Infants, chap. v.

<sup>3</sup> See *Nelson v. Duncombe*, 9 Beav. 232.



We have in a previous lecture<sup>1</sup> seen in what cases the High Court will allow maintenance out of an infant's estate, and what rules will assist it in determining the amount to be allotted. A guardian should be guided by the same rules. He should never allow the infant's estate to be used for his maintenance in cases where the Court would not allow it, and he must not expend more than the Court would allow. Otherwise the guardian might become personally liable for the amount expended by him, or for the costs of obtaining the sanction of the Court.<sup>2</sup>

Where a guardian has any real difficulty with reference to the application of the infant's funds towards his maintenance, he should, if the infant be resident in Calcutta, or be possessed of property within the limits of that town, apply to the High Court for its sanction or directions. He may do so either by a suit or by a petition without a suit.<sup>3</sup>

The duties and powers of the manager and guardian of an infant ward of the Court of Wards have been already considered.<sup>4</sup>

Where, under the provisions of section 10 of Act XL of 1858,<sup>5</sup> a certificate of administration to a minor's estate has been granted to the Public Curator, or, where there is no Public Curator, to some

<sup>1</sup> Lecture VII.

<sup>2</sup> See *ante*, p. 264.

<sup>3</sup> See *Ex parte McKey*, 1 Ba. and B. 405. See also *Ex parte Whitefield*, 2 Atk. 316, *ante*, p. 254.

<sup>4</sup> *Ante*, Lecture III.

<sup>5</sup> See *ante*, Lecture IV.

other fit person, the Civil Court may fix such allowance as it may think proper for the maintenance of the minor ; and it is the duty of the certificate-holder to pay such allowance to the guardian.<sup>1</sup>

Where, however, a guardian of the infant's person has been appointed by the Civil Court under the other provisions of Act XL of 1858, that Act does not give to the Civil Court any power to fix an allowance for the maintenance of the ward who is brought under its superintendence, and no power is given to the manager of the infant's property to provide for its maintenance out of its estate ; but in the absence of this express power, the certificate-holder and the guardian of the infant's person possess in this respect powers at least equal to those of an ordinary guardian, and may expend out of the income of the infant's estate such sum as may be necessary for the support of the infant.

Powers of trustees holding property in trust for minors.

When property is held by trustees in trust for a minor, full powers to provide for the maintenance of their *cestui que trustent* are given to such trustees by the Trustees and Mortgagees Powers Act,<sup>2</sup> which enacts<sup>3</sup> that "in all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be

<sup>1</sup> Sec. 11.

<sup>2</sup> XXVIII of 1866.

<sup>3</sup> Sec. 32.

lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not ; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same, and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen. Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations, as if the same were part of the income arising in the then current year."

The guardian is entitled to use his discretion with reference to the place of residence of his ward, <sup>Place of residence of infant.</sup> and may put proper restraint upon him, so as to prevent him from consorting with persons whose society might be injurious to him.<sup>1</sup>

Under the law as administered by the Court

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<sup>1</sup> See *Fleming v. Pratt*, L. J. 1 K. B. 195.

of Chancery in England, no guardian (not even the father) of an infant may remove the infant from out of the jurisdiction of the Court.<sup>1</sup> If he attempts to do so, the Court will appoint another guardian in his place. It is not easy to say how far, if at all, this rule is applicable to this country. The High Court can, and would probably, restrain a guardian from taking his ward out of Bengal without the leave of the Court ; and an attempt to take his ward out of Bengal might, under Section 21 of Act XL of 1858,<sup>2</sup> justify a District Court in removing a guardian, who had been appointed under that Act.

Education  
of infant.

It is the duty of a guardian to provide for the education of his wards according to their rank and expectations in life. If he exercises properly his discretion in this respect, the Court will not interfere with his guardianship.<sup>3</sup>

If in the exercise of such discretion the guardian should think it desirable that his ward should be educated at a school, he must choose a school for his ward. Apparently, where the ward is of that age at which the Courts consider that an infant is capable of selecting the custody in which he or she shall remain,<sup>4</sup> the guardian should to some

<sup>1</sup> *Mountstuart v. Mountstuart*, 6 Ves. 363 ; *Wellesley v. Beaufort*, 2 Russ. 18.

<sup>2</sup> See *ante*, Lecture IV, pp. 182—186.

<sup>3</sup> See *Talbot v. Earl of Shrewsbury*, 4 Myl. and Cr. 673.

<sup>4</sup> See *ante*, Lecture VI, p. 242.

extent consult the wishes of the infant with respect to the place of education. But in other cases the guardian need not pay any attention to the wishes of the ward; and even in cases where the infant is of an age to exercise a discretion with respect to the custody of his person, the Court would not interfere with the selection of a school by the guardian, unless there were reasons, other than the fact that the wishes of the infant had not been consulted, for the Court's interference.<sup>1</sup>

In addition to upholding a guardian's right to select a school for his ward, the Court will sometimes go so far as to send its own officers for the purpose of taking the ward to and keeping him at the school selected for him by his guardian.<sup>2</sup>

Where the infant has more than one guardian, and his guardians differ as to the mode of his education, or as to the school to which he should be sent, the Court would interfere and would not consider itself bound by the wishes of the majority of the guardians, but would propound a scheme for the education of the infant.

The education which a guardian is bound to provide for his wards must be one suitable to their rank and expectations. He is bound to see that they receive a religious and moral education in addition to

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<sup>1</sup> See *Hall v. Hall*, 3 Atk. 721.

<sup>2</sup> *Tremaine's case*, Stra. 168.

mere secular instruction,<sup>1</sup> and in so doing he must respect the wishes of the father of the infant,<sup>2</sup> so far as he is able to ascertain those wishes and by whatever means they may have been expressed.<sup>3</sup> Where the father has left no direction as to the mode of the religious education of his minor children, and did not during his life by his conduct waive his right to have them brought up in his own religion,<sup>4</sup> it is the duty of the guardian to bring up the children in the father's religion.<sup>5</sup>

The guardian should also, and the Court will, pay attention to the wishes of the mother with respect to the education of her infant children so far as they are not inconsistent with the wishes either expressed or implied of the father.<sup>6</sup>

Furthermore, it is the duty of guardians to bring up their wards with feelings of affection and dutiful obedience to their parents however bad and immoral those parents may be, and although the custody of their children may have been taken away from such parents on account of their bad conduct.<sup>7</sup>

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<sup>1</sup> *Wellesley v. The Duke of Beaufort*, 2 Russ. 29.

<sup>2</sup> *Campbell v. Mackay*, 2 M. & C. 34.

<sup>3</sup> *Shinner v. Orde*, L. R. 4 P. C. 60; S. C. 10 B. L. R. 125; and 14 Moo. L. A. 309; *ante*, p. 206. *Anon.*, 2 Ves. Sen. 56.

<sup>4</sup> See *ante*, Lecture V, p. 210.

<sup>5</sup> *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539; *ante*, p. 208.

<sup>6</sup> *Campbell v. Mackay*, 2 M. & C. 37; *Re Kaye*, L. R. 1 Ch. 387.

<sup>7</sup> See Simpson on the Law of Infants, p. 238; *Ex parte Ilchester*, 7 Ves. 381; and *Wellesley v. Duke of Beaufort*, 2 Russ. 43.

This duty is more clear where the character of the parent is liable to no reproach.

We now come to the consideration of what is in this country one of the most important duties of the guardian of an infant,—namely, his duty with reference to the marriage of his ward. Marriage  
of ward.

In England, the only duty of a guardian in this respect is to prevent his ward entering into an unfitting marriage;<sup>1</sup> but in this country, at least amongst Hindus, to that duty is superadded the paramount duty of providing a proper husband for his female ward, and the probably less urgent duty of providing a proper wife for his male ward. We have seen in a previous lecture<sup>2</sup> what relations of a minor are under the Hindu and Mahommedan laws respectively entitled to give the minor in marriage. On those persons, and not on the guardian of the infant's person, this duty falls.

The Hindu law distinctly, and peremptorily, Hindus. obliges the father to provide for his daughter, before she attains the age of puberty, a husband capable of procreating children.<sup>3</sup> After the father's death the marriage expenses of his daughters, and their

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<sup>1</sup> See *Barker v. Taylor*, 1 C. & P. 101.

<sup>2</sup> Lecture II.

<sup>3</sup> *Jumona Dassya v. Bamasoondari Dassya*, 1 I. L. R. Calc. S. 289; S. C. L. R. 3 I. A. 78; *Strange's Hindu Law*, p. 36; Menu, chap. ix, sloka 88; *Vyavastha Darpana*, p. 651.

maintenance until marriage, are, under the Hindu law, a charge upon his estate.<sup>1</sup>

With respect to male minors, there is not the same obligation upon fathers and other guardians under the Hindu law to provide for their marriage. Inasmuch as amongst Hindus marriage completes for the man the regenerating ceremonies, expiatory, as is believed, of the sinful taint that every child is supposed to contract in the parent's womb, and is for Sudras the only one that is allowed,<sup>2</sup> and also inasmuch as marriage, being the means of obtaining legitimate male issue, is a matter of religious obligation amongst Hindus, it is the duty, though not a peremptory one, of the father or guardian to provide a wife for his son or male ward.

Mahomedans.

With respect to Mahommedans, their law does not impose upon guardians any religious obligation to provide suitable marriages for their wards, though it gives them the power to make such provision; but, except where the person giving him in marriage is his father or grandfather, the infant has, on arriving at puberty, or rather on attaining the age of majority, the option of either abiding by the marriage or repudiating it.<sup>3</sup>

Marriage of guardian with ward.

The Mahomedan law does not allow the *Kazi*, who, as we have seen,<sup>4</sup> is, after her relatives and the

<sup>1</sup> Vyavastha Darpana, p. 370.

<sup>2</sup> Strange's Hindu Law, p. 35

<sup>3</sup> See *ante*, Lecture VIII.

<sup>4</sup> *Ante*, Lecture II.



*Mowla-ool-mowalat*, entitled to give a female infant in marriage, to marry her himself, or to give her in marriage to his son;<sup>1</sup> but this prohibition does not extend to other guardians. In an English case,<sup>2</sup> the marriage of an infant of tender years to her guardian was pronounced null and void, on the ground that the marriage had been brought about by force and undue influence.

It is the duty of the guardian by every means in his power to prevent his ward entering into an unequal marriage.<sup>3</sup> It is not possible to lay down any rule as to what is, and what is not, an unequal marriage. Congruity of age and equality of rank and fortune are the chief means of determining the fitness of a marriage.

Where a guardian is himself conniving at the improper marriage of his ward, he will be restrained by the Court from bringing about the marriage,<sup>4</sup> and may also be removed from the office of guardian.

The High Court has full powers to prevent infants subject to its jurisdiction from entering into improper marriages. Under the English law, where an infant is a ward of Court,<sup>5</sup> a person marrying

Fitness of marriage.

Wards of the High Court.

<sup>1</sup> Baillie's Digest, p. 47.

<sup>2</sup> *Harford v. Morris*, 2 Hagg. Con. Rep., at p. 436.

<sup>3</sup> *Barker v. Taylor*, 1 C. & P. 101.

<sup>4</sup> *Wellesley v. Duke of Beaufort*, 2 Russ. 29. A guardian must make no profit out of the marriage of his ward; see Simpson on Infants, p. 117; and Strange's Hindu Law, p. 38.

<sup>5</sup> As to what constitutes an infant a ward of Court, see *ante*, p. 217.

such ward, or attempting to bring about a marriage of the ward, without the sanction of the Court, is liable to be punished for contempt of Court. This rule of English law is apparently applicable to wards of the High Court.

Guardian  
not to make  
profit out  
of estate.

It is a settled principle of the law respecting the guardianship of infants that a guardian must not make any profit for himself out of the management of the infant's estate. Except where, as in the case of a Public Curator, or of a manager under the Court of Wards, the Legislature has provided for the remuneration of the person managing the infant's estate, or where a father or other person, in leaving property to an infant, provides for the remuneration of the infant's guardian, the guardian must discharge his duties without reward.

The guardian of a minor is bound in duty to abstain from entering into any arrangement which benefits him at the expense of the minor's estate; and if he enters into any such arrangement, it is incumbent on him, immediately after the minor comes of age, to obtain from him, not an accidental, but a distinct formal ratification.<sup>1</sup>

Conflicting  
interests of  
guardian  
and ward.

When the interests of the guardian conflict in any way with those of his ward, the guardian is bound to see that the ward is provided with proper

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<sup>1</sup> *Prosunno Coomar Ghuttuck v. Woomachurn Mookerjee*, 20 W. R. C. R. 274.

and independent advice and assistance. No person can act as next friend<sup>1</sup> or guardian *ad litem*<sup>2</sup> of an infant in a suit, if his interest be adverse to that of the infant. If he does so act, the minor is not bound by the suit, and can repudiate his liability thereunder on the ground that he was not properly represented in such suit.<sup>3</sup>

The relation of guardian and ward is that of trustee and *cestui que trust*,<sup>4</sup> with this distinction, namely, that, although the fact of an adult *cestui que trust* having authorized or acquiesced in a breach of trust exonerates the trustee, a trustee or guardian of the estate of an infant cannot make use of this defence, and, unlike an adult *cestui que trust*, an infant cannot give a release.<sup>5</sup>

An infant cannot make a gift of any portion of his property to his guardian.<sup>6</sup> The influence which Gift by infant to guardian. a guardian necessarily exercises over his ward raises a presumption that any such transaction between a guardian and his ward is fraudulent, and such gift as well as any sale of his property to his guardian will be set aside by the Court, subject,

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<sup>1</sup> Act X of 1877, sec. 445.

<sup>2</sup> Act X of 1877, secs. 456 & 457.

<sup>3</sup> See *Unmoda Dabee v. M. L. Stevenson*, 22 W. R. C. R. 291; *H. G. French v. Baramashee Banerjee*, 8 W. R. C. R. 29.

<sup>4</sup> *Mathews v. Brise*, 14 Beav. 345; *Beaufort v. Berty*, 1 P. Wms. 704.

<sup>5</sup> *Wilkinson v. Parry*, 4 Russ. 276.

<sup>6</sup> *Wood v. Downes*, 18 Ves. 127. Under the Hindu law all gifts by minors are void, see Stokes' Hindu Law Books, p. 134.

however, to the infant having to pay back any sum of money which he may have received on account of such sale.

All gifts and sales by an infant are revocable, provided that, in the case of a sale, the infant is able to restore the other party to his former position; and in the case of a gift also, where the donee has expended money on the repairs or improvement of the property which has been given to him, the infant in setting aside the gift would be obliged to recoup this expenditure. In one case<sup>1</sup> the Sudder Court set aside a conveyance by way of gift to the guardian by the minor without prejudice to the guardian's having recourse to the minor's estate for money expended on his account.

Trans-  
actions  
between  
guardian  
and ward  
soon after  
attainment  
of major-  
ity.

This protection which the law affords to infants against the wrongful exercise of the influence of their guardians over them is extended to transactions between them and their guardians after they have attained the age of majority and while that influence still remains.

The 111th section of the Indian Evidence Act<sup>2</sup> provides that "where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith

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<sup>1</sup> *Lachmun Dass v. Rupchand*, 5 Sel. Rep. 114; see also *Baboo Ram Ghose v. Kalee Pershad Ghose*, 4 Sel. Rep. 17.

<sup>2</sup> Act I of 1872.

of the transaction is on the party who is in a position of active confidence." Illustration (b) to that section is as follows:—"The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father."

This section of the Evidence Act is merely an embodiment of the English rule of law, with reference to which Lord Brougham said in *Hunter v. Atkins*:<sup>1</sup> "There are certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client, ward, or *cestui que trust* takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage from his relation to the other party beyond what may be the natural and unavoidable consequence of kind-

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<sup>1</sup> 3 M. & K. 135.

ness arising out of that relation." This rule is equally applicable whether the parent of the child or any other person be its guardian.

Releases  
by wards  
soon after  
attaining  
majority.

The protection of the law extends so long as the infant is under the influence of its guardian, and the Courts will look very jealously at releases executed by wards soon after attaining their majority in favour of their *quondam* guardians. Where such a release is in question, the *onus* of showing the *bona fides* of the transaction is on the guardian, and it is for him to show that he derived no benefit from the transaction, that he placed his ward in full possession of all the facts and accounts relating to his property, and explained to him the full extent of his rights therein.

In the case of *Gillon v. Mitford*,<sup>1</sup> where a minor had given a release to his guardian soon after coming of age, Sir Thomas Strange said, that the principles of equity which govern that species of case "are those which render it the duty of the Court, wherever a man appears to have been acting as guardian, or as trustee in the nature of guardian to a minor, to see, when he comes to give up his trust, that a fair account has been rendered, and that his release, if he have obtained one, has been fair. They operate in other relations besides that of guardian and ward; and, in their application, are always considered not

<sup>1</sup> 1 Mad. Notes of Cases 281. See also *Ramkissen Patjoshee Mahapatur v. Hurrykissen Mahapatur*, 15 S. D. A. 274.

as ordinary principles regulating rights, and as such liable to be modified by a variety of personal circumstances, but as principles of policy to be enforced for the sake of the public, as affording by their efficacy a salutary and important protection, where protection is peculiarly needed, and without the influence of which great imposition might be practised, and incalculable injustice done. For this reason, their application does not depend upon detection of positive unfairness in the arrangement proposed to be impeached. If it confer an advantage upon the guardian, it may be one that he may have merited; but upon the principles of the Court, it may not be the less bound to set it aside. Neither does it depend upon its appearing whether the minor just come of age knew at the time in its full extent what it was that he was giving up, and was apprized of his option to withhold his consent. In ordinary cases a man will be bound by his release, if there appear to have been a consideration for it, and that, knowing at the time the extent of his rights, he was aware of the nature of the instrument he was about to execute. But I apprehend it is different between a guardian and ward, at the critical moment of settling the account, upon the latter coming of age. At law the relation may have ceased, the minor having become legally *sui juris*. But an influence for the most part on the side of the guardian still continuing, equity presumes its operation, and will

not permit him at that moment, in the act of settling the account, to derive an important advantage for which he could not have stipulated; much less if it be more than doubtful whether the ward was informed at the time of the extent to which he was entitled to call him to account, and whether he possessed advice to satisfy the Court that he was not misled in releasing him. It is said in a case in *Peere Williams*:<sup>1</sup> 'Heirs even when of age are under the care of a Court of Equity, and then want it most, the law taking care of them before.'

In the case of *Archer v. Hudson*,<sup>2</sup> where a niece two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing in *loco parentis* to her, Lord Langdale, in setting aside the transaction, said: "Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and a child, the child being of age; but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, the presumption is that an undue influence has been exercised

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<sup>1</sup> *Osmond v. Fitzroy*, 3 P. Wms. 129.

<sup>2</sup> 7 Beav. 51.



to procure that liability on the part of the child, and that it is the business and duty of the party, who endeavours to maintain such a transaction, to show that the presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control." Thus a transaction between a person who has just attained the age of majority and his guardian, or another person standing in *loco parentis* to him, will be set aside even against a third person, if he takes a benefit, knowing the nature of the circumstances; but this would be otherwise, where there is no ground for imputing to him knowledge of undue influence.

In every case, even where the *cestui que trustent* have been adults throughout the existence of the trust, the trustee in taking a release from them must not only disclose to them the whole of the facts connected with the trust, but he must explain to them the exact nature of their rights with reference thereto, and this rule applies with greater force where the *cestui que trust* has just emerged from a state of pupillage.

Family  
arrange-  
ments.

Where, however, the transaction between a father and his son, or a guardian and his ward, is of the nature of a family arrangement, as where an estate is resettled in a way advantageous for the family generally, though the son or ward gives up some of his rights, the Court will not set it aside unless it be clear that the son or ward had not a reasonable knowledge of what he was doing. Transactions of this kind are looked upon with favour by the Court, and the Court will not, as in the case of ordinary releases given by a ward to his guardian, or other transactions between them soon after the ward has attained majority, raise any presumption of undue influence.<sup>1</sup>

Acquies-  
cence.

If the arrangement, release, or other similar agreement entered into by the minor soon after attaining his majority has been acquiesced in by him for a long time, or he has acted on it, or has permitted other parties to the arrangement to act on it, or if he has allowed third persons to acquire rights under it, or he has recognised its validity, it will be considered binding on him.<sup>2</sup>

Mere lapse of time is not, however, in itself a

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<sup>1</sup> See Simpson on the Law of Infants, p. 267 ; *Tweddell v. Tweddell*, Turn. and Russ. 1.

<sup>2</sup> See *Boidonath Dey v. Ramkishore Dey*, 10 B. L. R. 326 note ; *Doorgu Churn Shaha v. Ramnarain Doss*, 10 B. L. R. 327 note ; and see *post*, Lecture XI, as to the ratification by an infant of the acts of his guardian.

bar to a suit;<sup>1</sup> it is merely evidence of ratification. In one case,<sup>2</sup> a settlement was set aside after a lapse of ten years. After a reasonable time has elapsed, very slight evidence of confirmation will be sufficient, as for instance, the execution of a subsequent deed reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was in one case<sup>3</sup> held to operate as an absolute confirmation of the whole of the former deed, and to be a bar to a suit to set it aside, though the deed was one which, apart from lapse of time and subsequent confirmation, the Court could not have upheld.

A guardian in managing an infant's estate must have regard to the interest of the inheritance, not the immediate income.<sup>4</sup> After all necessary payments, he must accumulate the income of the infant's property.

Where a minor's estate is encumbered, or there are debts for which his estate would be liable,<sup>5</sup> it is the duty of the guardian to endeavour to pay off

Payment  
of debts  
due by  
infant's  
estate.

<sup>1</sup> *Rajnarain Deb Chowdhry v. Kassee Chunder Chowdhry*, 10 B. L. R. 324; *Dharmajivaman v. Gurrav Shrinivas*, 10 Bom. H. C. Rep. 311; see *post*, Lecture XI, as to the law with respect to the limitation of suits by infants.

<sup>2</sup> *Wollaston v. Tripe*, L. R. 9 Eq. 44; see also *Coutts v. Acworth*, L. R. 8 Eq. 567.

<sup>3</sup> *Jarratt v. Aldan*, L. R. 9 Eq. 463.

<sup>4</sup> *Sutton v. Jones*, 15 Ves. 588.

<sup>5</sup> See the Indian Contract Act (X of 1872), sec. 68; *ante*, Lecture VIII.

such debts by strict economy out of the income of the estate.<sup>1</sup> He should not sell or encumber the estate until he is forced to do so.<sup>2</sup>

The guardian is bound to exercise the discretion of a reasonable and prudent man with respect to the payment of the debts. He is not bound to contest them whether they be well or ill founded,<sup>3</sup> nor is he necessarily accountable for sums paid by him in discharge of debts barred by limitation, where he has found those sums justly due.<sup>4</sup>

Duty of  
guardian  
with res-  
pect to  
suits.

It is the duty of the guardian of an infant to bring, or cause to be brought, on behalf of his ward, all suits which are manifestly for his benefit or for that of his estate;<sup>5</sup> and it is also his duty to see that the interests of his ward are properly cared for in suits brought against such ward.<sup>6</sup>

Where the infant is defendant in a suit, the guardian should not take any active part, unless he can do anything positively for the infant's benefit.<sup>7</sup>

<sup>1</sup> *Mussamut Bukshan v. Mussamut Maldai Koeri*, 3 B. L. R. A. C. 423; S. C., *Musst. Bukshun v. Musst. Doolhin*, 12 W. R. C. R. 337.

<sup>2</sup> As to when a guardian may charge or sell the estate of his ward, see *post*, Lecture X.

<sup>3</sup> *Baboo Lekhray Roy v. Baboo Mahtab Chand*, 14 Moo. I. A. 393; S. C. 10 B. L. R. 35; and 17 W. R. C. R. 117.

<sup>4</sup> *Chowdhry Chuttarsal Singh v. The Government*, 3 W. R. C. R. 57.

<sup>5</sup> See *Sheo Proshad Jha v. Gungaram Jha*, 5 W. R. C. R. 221; see *post*, Lecture XII, as to suits by and against infants.

<sup>6</sup> See Macnaghten's Mahomedan Law, App., Title *Guardian*, 8.

<sup>7</sup> *The Court of Wards v. Raj Coomur Deo Nundun Singh*, 16 W. R. C. R. 142.

Where he can do nothing, he should merely see that the case against the infant is strictly proved, and should submit the infant's rights to the Court.

Where the minor is a member of a joint Hindu family, and his interests are likely to be prejudiced by the property remaining joint, a suit for partition should be brought on his behalf. It has been held by the Madras High Court that a suit for partition can only be brought on behalf of an infant when it is distinctly for the benefit of the infant, and that *primâ facie* a partition is not for the infant's benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and besides, by partition the minor would lose the benefit of survivorship.<sup>1</sup>

Where the co-parceners are wasting the property, or setting up rights adverse to the infant, there is no doubt that a partition suit would lie and should be brought ; and in spite of the above decision of the Madras High Court, it may be said that, in nearly every case where a minor is a member of a joint family, a suit for a partition is for his benefit, as his share, when separated, is not liable to contribute to many expenses, as for instance, the marriages of

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<sup>1</sup> *Kanakshi Ammal v. Chidambara Reddi*, 3 Mad. H. C. R. 94. See *Alimelammal v. Arunachelum Pillai*, 3 Mad. H. C. Rep. 69 ; and *Nallappa Reddi v. Balammal*, 2 Mad. H. C. Rep. 182. See also Macnaghten's Hindu Law, Vol. II, p. 13.

the children of his co-parceners, to which he must contribute so long as his share is undivided.

A partition by arbitration,<sup>1</sup> or by the Collector<sup>2</sup> is binding on the minor, provided that he be not injuriously affected thereby, and that the person representing him in such proceedings act *bonâ fide* and with a due regard to his interest.<sup>3</sup>

Settlement  
on mar-  
riage.

It is the duty of the guardian to see that on the marriage of his female ward a proper settlement of her property is made.

In England, where the husband by marriage acquires rights in the property of his wife, this duty is a most necessary one, and although in this country no person by marriage acquires any interest in the property of the person whom he or she marries, it is clear that the influence which the husband exercises over his wife, together with the want of capacity of the wife herself, is calculated to endanger the wife's interest in her property.

The Succession Act<sup>4</sup> provides<sup>5</sup> that "the property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or, if he be dead or absent from British India, with the approbation of the High Court."

<sup>1</sup> *Ramurain Poramanick v. Sreemutty Dasse*, 1 W. R. C. R. 281.

<sup>2</sup> *Baboo Huree Pershad Jha v. Muddun Mohun Thakoor*, 8 B. L. R. Ap. 72; S. C. 17 W. R. C. R. 217.

<sup>3</sup> *Kalee Sunkur Sanmyal v. Denendro Nath Sanmyal*, 23 W. R. C. R. 68.

<sup>4</sup> Act X of 1865.

<sup>5</sup> Sec. 45.

The amount to be settled on an infant about to marry would depend on the circumstances of each particular case, and it is not possible to lay down any fixed rule either with respect to the proportion of the amount settled to the income of the infant's estate, or with respect to the way in which it is to be settled. The High Court, in settling the infant's property under the powers given to it by the Succession Act, would probably be guided by the rules which are followed by the English Court of Chancery in settling on marriage the property of its wards ; but it is unfortunately not very clear what those rules are.

The settlement should maintain the interest of the infant, modified to some extent by a consideration which the infant is to gain by the marriage. According to the English practice, as Mr. Simpson points out in his recent work on the Law of Infants:<sup>1</sup> "The usual outline of a settlement would probably be, that the husband would take the first life-interest in his own property, and the wife the first life-interest in hers, to her separate use without power of anticipation. Then the issue of the marriage would be provided for in the usual way, and in default of issue, the property of the husband is generally limited to him absolutely ; and the property of the wife, if she survive her husband,

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<sup>1</sup> At p. 314.

to her absolutely ; if she die in his lifetime, according as she shall appoint by will, and in default of appointment, to her statutory next-of-kin."

In most cases a husband will be given some interest in his wife's property, except he may have married her in contempt of Court, in which case he will be, unless the contempt be not an aggravated one, excluded from any participation therein. Where the woman is the offending party, she cannot be excluded from all interest in her husband's property.<sup>1</sup> Where the fund is small, it is sometimes paid over to the husband, or given to him to be employed by him in trade. The Court will in fact generally sanction what the infant's relations consider as a prudent and safe settlement of his property.

The guardian of a Mahomedan infant is bound to see that on the marriage of his ward a proper provision is made for her dower.

Resignation of guardian-ship.

A guardian, who has acted as such, cannot arbitrarily resign his trust. A guardian, as we have seen,<sup>2</sup> is a trustee, and he cannot be relieved from his trust until he has fully accounted for his dealing (if any) with the minor's property, and until another person has been duly appointed in his place.<sup>3</sup>

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<sup>1</sup> *Re Murray*, 3 Dru. and War. 83.

<sup>2</sup> *Ante*, p. 315.

<sup>3</sup> See *Mussamat Gourmonee v. Bamasoonderee*, 2 Sev. Reps. note to p. 747 ; S. C. 16 S. D. A. Rep. 532.



Where the infant is resident in Calcutta, the best course for a guardian, desiring to be relieved of his trust, to pursue, is to apply to the High Court either by a petition or by a suit for the appointment of a guardian to the infant.<sup>1</sup> Where the infant is resident in the mofussil, the guardian should make an application to the Civil Court<sup>2</sup> under Section 4 of Act XL of 1858.<sup>3</sup>

A guardian must, on the termination of his guardianship, furnish to his ward a full account of his dealings with the ward's property; and he is liable, both during the minority of the ward, and after the ward has attained majority, to be sued for such account. Accounts.

This rule applies equally to the *kurta* of a joint Hindu family, or to any other person having charge of the property of an infant.<sup>4</sup>

There are also certain special provisions of law with respect to accounts to be furnished by managers and guardians under the Court of Wards and to certificate-holders appointed by the Civil Court under Act XL of 1858.

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<sup>1</sup> See *ante*, Lecture V.

<sup>2</sup> See *ante*, p. 148.

<sup>3</sup> See *ante*, Lecture IV.

<sup>4</sup> *Abhoychandra Roy Chowdhry v. Pyarimohan Guho*, 5 B. L. R. 347; S. C. 13 W. R. F. B. R. 75.

## LECTURE X.

### THE POWERS OF GUARDIANS.—(Continued.)

ALTHOUGH there is very little distinction between the Hindu and the Mahomedan law in respect to the powers of guardians over the property of their wards, the powers of the manager of a Hindu infant's property have been most often discussed in the Courts of law of this country.

Hindu law  
as to sale  
or mort-  
gage of in-  
fant's pro-  
perty.

The circumstances under which the manager<sup>1</sup> or guardian<sup>2</sup> of the estate of an Hindu infant is justified in selling or mortgaging his ward's property were clearly defined by the Privy Council in the leading case of *Hunooman Pershad Pandey v. Mussamut Babooee Munraj Koonweree*.<sup>3</sup>

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<sup>1</sup> This would include an executor. See *Sreemutty Dossee v. Tarachurn Coondoo Chowdhry*, Bourke's Rep. App. from O. J. 48; S. C., 3 W. R. M. A. 7 note. There is a question whether or not the powers of an executor are not altered by the Hindu Wills Act (XXI of 1870), which (sec. 2.) applied to the wills of Hindus, Jains, Sikhs, and Buddhists, made on or after the 1st of September, 1870, the provisions of the 179th section of the Succession Act (X of 1865), which provides that the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The Hindu Wills Act, however, provides (sec. 3) that nothing therein contained shall authorize any Hindu, Jain, Sikh, or Buddhist to create in property any interest which he could not have created before the 1st of September, 1870.

<sup>2</sup> *Radha Kishore Mookerjee v. Mirtoonjoy Gow*, 7 W. R. C. R. 23; *Dalpatasing v. Nanubhai*, 2 Bom. H. C. Rep. 323.

<sup>3</sup> 6 Moo. I. A. 393; S. C., 18 W. R. C. R. note to p. 81, and 2 Sev. note to p. 253.

The first rule laid down in that case was that, under the Hindu law, the right of a *bond fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.<sup>1</sup>

Under Hindu law *de facto* manager has same power as *de jure* manager.

A sale, however, by a person who does not in any way represent the minor, may be avoided by the minor on that ground only.

This principle does not, however, hold good under the Mahomedan law, which permits no one except the *near* guardians<sup>2</sup> of an infant under any circumstances to alienate the infant's property;<sup>3</sup> and, except under the Hindu law, a sale of, or incumbrance on, property belonging to a minor by any person other than his natural or properly-constituted guardian would be invalid, and liable to be repudiated by the minor on attaining his majority.<sup>4</sup> Where, however, the minor had received any advan-

Not so under the Mahomedan law.

<sup>1</sup> See also *Gunga Pershad v. Phool Singh*, 10 W. R. C. R. 106; S. C., 10 B. L. R. note to p. 368.

<sup>2</sup> See *ante*, Lecture II.

<sup>3</sup> *Musst. Bukshun v. Musst. Maldai Kooeri*, 3 B. L. R. A. C. 423; S. C., *Musst. Bukshun v. Musst. Doolhin*, 12 W. R. C. R. 337; *Rutton v. Dhoomie Khan*, 4 Agra H. C. Rep. 21; *Hamir Singh v. Musst. Zakia*, I. L. R., 1 All. Ser. 57. Macnaghten's Principles of Mahomedan Law, chap. viii, princ. 6.

<sup>4</sup> See *post*, Lecture XI.

tage by the sale or incumbrance, he would, in setting it aside, be required to recoup the purchaser or incumbrancer to that extent.<sup>1</sup>

Reasons  
for this  
distinction.

The joint family system prevalent amongst Hindus seems to be one of the reasons for this distinction between the Hindu law and the other systems of law administered in British India. The *karta* of an undivided family is in the position of guardian of the shares of the infant members, although the infants may have other relations entitled to the guardianship of their estates.

In one case,<sup>2</sup> where the father of the infants was alive, and had not consented to the sale of their property, the High Court upheld a sale by the brother of the infants on the authority of *Hunooman Pershad Pandey's* case, and on the ground that the brother was *de facto* acting in the matter as the guardian of his brothers.

The instrument of  
sale.

It does not seem to be material whether the guardian or manager should, in the instrument of sale, describe himself as such,<sup>3</sup> provided it be clear from the instrument that it is the property of the infant which is being sold.<sup>4</sup>

<sup>1</sup> *Musst. Bukshun v. Musst. Maldai Kooeri*, 3 B. J. R. A. C. 423; S. C., *Musst. Bukshun v. Musst. Doolhin*, 12 W. R. C. R. 337; *Hamir Singh v. Musst. Zakia*, I. L. R., 1 All. Ser. 57; see *post*, Lecture XI.

<sup>2</sup> *Gunga Pershad v. Phool Singh*, 10 W. R. C. R. 106; S. C., 10 B. L. R. note to p. 368.

<sup>3</sup> *Judoonath Chuckerbutty v. Tweedie*, 11 W. R. C. R. 20.

<sup>4</sup> *Gopee Mohun Takoor v. Rajah Radhanat*, 2 Knapps. P. C. Rep. 228; *Nelye Roy v. Odeet Roy*, 10 W. R. C. R. 241.

The deed need not contain any recital of the necessity on account of which the property is sold,<sup>1</sup> as such necessity can be proved by other evidence. In fact, a recital of the necessity is by itself no evidence of the necessity.<sup>2</sup>

With reference to the power of the manager or guardian<sup>3</sup> of the estate of an infant heir, to charge such estate, the Privy Council, in *Hunooman Pershad Pandey's* case,<sup>4</sup> said,—“The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to

Power of manager under Hindu law to charge estate of infant.

<sup>1</sup> *Womes Chunder Sircar v. Digumburee Dossee*, 3 W. R. C. R. 154.

<sup>2</sup> *Rajlakhi Debia v. Gokul Chandra Chowdry*, 3 B. L. R. P. C. 57; S. C., 12 W. R. P. C. 47.

<sup>3</sup> The powers of the guardian of an infant and of the managing member of a Hindu family are the same in this respect. *Radhakishore Mookerjee v. Mirtoonjoy Gow*, 7 W. R. C. R. 23; *Dalpatsing v. Nanabhai*, 2 Bom. H. C. Rep. 323.

<sup>4</sup> 6 Moo. I. A. 423; S. C., 18 W. R. C. R. note to p. 81, and Sev. note to p. 253.

which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt."

This shows that the manager can charge or alienate the infant's estate on the ground of benefit in addition to that of necessity. There are, since the decision of the Privy Council in *Hunooman Pershad Pandey's* case, decisions of the High Court<sup>1</sup> which hold that necessity alone will justify the sale or charge of an infant's property under the Hindu law; but perhaps, although this question is a matter of some doubt, and was not expressly decided in *Hunooman Pershad Pandey's* case, the *dictum* of the Privy Council in that case, that the power of a manager to charge the estate can be exercised rightly in case of need or for the benefit of the estate, will be now followed.<sup>2</sup>

As Sir Thomas Strange<sup>3</sup> says, minors "in general will not be bound but by necessary acts, or such as

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<sup>1</sup> *Rudha Pershad Singh v. Musst. Tulook Rajhooer*, 20 W. R. C. R. 38; *Runjeet Ram Koolal v. Mahomed Waris*, 21 W. R. C. R. 49.

<sup>2</sup> *Saravana Tevan v. Muttayi Ammal*, 6 Mad. H. C. Rep. 371; *Trumbak Anant v. Gopalshet bin Mahadshet Mahadu*, 1 Bom. H. C. Rep., 2nd edn. 27; see *post*, p. 340.

<sup>3</sup> 1 Hindu Law, p. 203, *Dagdu v. Kamble*, 2 Bom. H. C. Rep. 379.

are evidently for their benefit, the jealousy in their favour of the Hindu corresponding with that of the English law."

No distinction can be drawn between the power to charge and the power to sell, and the need which would justify the exercise of the one would justify that of the other.

The next question is what amount of necessity will, under the Hindu law, justify the sale or incumbrance of an infant's property.

What necessity will justify sale or incumbrance.

To preserve the infant and his family from want and for its maintenance and support, the guardian is justified in selling or charging the property; but it is not necessary to authorize a sale of the infant's property, that the family should be in absolute and urgent want of the necessaries of life at the very moment, or sufficient to take away the power, that they are subsisting at the time upon the charitable donations of their friends and relations, who may at any moment withdraw their help from them. Land is not to be sold at a moment's warning, but if the family have no certain resource for the future, and no actual means of providing for themselves the decent necessaries of life according to their condition, and no regular competent allowance, but only mere casual charity, this constitutes a reasonable necessity to warrant the sale of the property.<sup>1</sup>

For maintenance of infant.

<sup>1</sup> *Doe dem Bissonath Dutt v. Doorgapersad Dey*, East's notes, case 34; Morley's Dig., Vol. II, p. 50. See Macnaghten's Precedents of Hindu Law, chap. x, case 13.

Where the infant has other means of subsistence, or where his father is alive and capable of supporting him, the infant's land cannot be sold for his maintenance.<sup>1</sup>

It has been held<sup>2</sup> that a Hindu widow who is compelled to sell the property of her sons in order to preserve them from want, should consult the relations of her children before selling the property; but that, in case of their refusing their consent, or in a case of emergency, as the subsistence of a child, the portion of a daughter, and a *shraddh*, she can sell without their consent. This obligation upon the widow amounts to very little, and the consent or dissent of the relations does not alter her powers. She can only sell in cases of necessity, and then independently of the consent of the relations. In other cases, no amount of consent on the part of the relations would justify the widow in selling the property.

Payment of  
debts of  
ancestor.

The payment of the debts of the ancestor, through whom the minor acquired his property, constitutes a sufficient legal necessity for sale or mortgage.<sup>3</sup>

As to this proposition there was, however, at one time some doubt. Macnaghten in his *Principles of Hindu Law*<sup>4</sup> shows that, under the Hindu law, a

<sup>1</sup> *Kishn Lochan Bose v. Tarini Dasi*, 5 Sel. Rep. 55.

<sup>2</sup> *Doe dem Bissonath Dutt v. Doorgapersad Dey*, East's notes, case 34; Morley's Dig., Vol. II, p. 50.

<sup>3</sup> See Macnaghten's *Hindu Law*, Vol. II, chap. xi, case 6.

<sup>4</sup> Pages 111 and 112.



minor heir is not liable for the debt of the ancestor whose property he inherits, and that, although the minor heir may be in enjoyment of the property, the creditors of the ancestor cannot make any claims upon the heir until he has attained the age of majority.

He there says:<sup>1</sup> "Where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account during his minority." And again he says:<sup>2</sup> "A guardian may, indeed, dispose of a portion (of the property) to meet a necessity arising for the minor's subsistence, but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable."

This doctrine, however, has long fallen into disuse, and minority would not now be held to be any defence to a suit for the administration of the property of the minor's deceased ancestor.<sup>3</sup>

Although "minors are under the protection of law favoured in all things which are for their benefit, and not prejudiced by anything to their disadvan-

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<sup>1</sup> Chap. vii, p. 105.

<sup>2</sup> Chap. vii, p. 111.

<sup>3</sup> See *Dagdu v. Kamble*, 2 Bom. H. C. R. 379.

tage,"<sup>1</sup> there would be neither reason nor justice in favour of the rule requiring creditors of the ancestor to wait for payment until the majority of the heir. As the Bombay High Court put it in the case of *Dagdu v. Kamble*:<sup>2</sup> "It is easy to conceive cases in which it would be far more beneficial to the heir, if he have no money or other personal estate out of which the debts may be paid, to sell a portion of the immoveable estate in order to pay the debts of his ancestor or his own properly incurred debts for necessaries, rather than allow a heavy rate of interest on these debts to consume the whole of the estate. Such a partial sale might be the only means of preserving any portion of his patrimony." Besides, creditors, if they do not proceed, would, in many cases, be barred by the law for the limitation of suits<sup>3</sup> from asserting their claims.

Religious  
ceremonies.

The performance of an indispensable religious ceremony,<sup>4</sup> such as the *shraddh* of the minor's father, is, by Hindu law, a necessity sufficient to justify a charge or sale of the minor's property for that purpose.<sup>5</sup>

Marriage  
expenses.

The reasonable marriage expenses of the minor,<sup>6</sup>

<sup>1</sup> Colebrooke's Obligations, bk. iv, chap. x, para. 585.

<sup>2</sup> 2 Bom. H. C. Rep. 380.

<sup>3</sup> See Acts IX of 1871 and XV of 1877; *post*, Lecture XI.

<sup>4</sup> *Saravana Tevan v. Muttayi Ammal*, 6 Mad H. C. Rep. 371.

<sup>5</sup> *Su keenath Bamoo v. Huro Churn Burnj*, 6 W. R. C. R. 34. See Macnaghten's Hindu Law, Vol. II, chap. xi, case 6.

<sup>6</sup> *Juggessur Sircar v. Nilambur Biswas*, 3 W. R. C. R. 217.

and possibly those of his female relations,<sup>1</sup> would be a necessity within the rule. There is no doubt they would be so if the minor is a member of a joint Hindu family, and the females to be married are dependent members of such family.

A *bonâ fide* sale by the guardian for the purpose of carrying on a litigation of importance to, and likely to benefit the estate of, the minor would also be upheld,<sup>2</sup> as also would a mortgage to raise money to save the property from sale for arrears of Government revenue.<sup>3</sup>

For purposes of litigation.

Or for payment of Government revenue.

Apart from questions of necessity, it is not easy to say what is for the benefit of the minor's estate. Perhaps the best test is to see whether the charge be one that a prudent owner would make in order to benefit the estate.

It is not intended that this power should authorize the guardian to sell or charge the inheritance for the purpose only of increasing the immediate income of the minor or of his estate. In *Radha Pershad Singh v. Musst. Talook Rajkooer*,<sup>4</sup> the Court<sup>5</sup>

<sup>1</sup> *Preag Narain v. Ajodhyapersad*, 7 Sel. Rep. 513; *Doe dem Bissonath Dutt v. Doorgapersad Dey*, East's notes, case 34; Morley's Dig., Vol. II, p. 50.

<sup>2</sup> *Musst. Syedun v. Syed Velayet Ali Khan*, 17 W. R. C. R. 239; *Gunga Pershad v. Phool Singh*, 10 W. R. C. R. 106; S. C., 10 B. L. R. note to p. 368.

<sup>3</sup> Macnaghten's Hindu Law, Vol. II, chap. xi, case 2, p. 293; *Gooropersaud Jena v. Muddumohun Soor*, 12 S. D. A. Rep. 980.

<sup>4</sup> 20 W. R. C. R. 38.

<sup>5</sup> Phear and Ainslie, JJ.

held, that "even if it be desirable that a minor should have any benefit, such as an increase to a very small income, from some undertaking or enterprise, *e. g.*, obtaining a lease of certain rents, that circumstance is not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit." The benefit to the infant's estate is in fact synonymous with the interest of the inheritance.

There is not, as far as I know, a single reported case decided by an Indian Court where a sale has been upheld on the ground of its being for the benefit of the minor apart from the reason of its being justified by necessity.

Perhaps the right way of reading the *dictum* in *Hunooman Pershad Pandey's* case is in the words of the Sudder Court in the case of *Goorooopersaud Jena v. Muddunmohun Soor*:<sup>1</sup> "It is enough for us now to say that we hold that a mortgage entered into by the mother of a minor of a portion of the minor's property *for the benefit of the minor*, is valid under Hindu law, *that benefit being the causing of, or creating, a necessity which has arisen.*" And further on, in the same judgment, the Court said:—"The benefit of the minor as creating the necessity is the test by which the legality of the transaction must be tried; but setting authority aside, and looking only to the

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<sup>1</sup> 12 S. D. A. Rep. 980.

reason of the thing, it seems to us that the rule in such cases as that now before us, is, that a party filling a fiduciary character like that of a guardian, is authorized to perform *any act which is manifestly for the infant's benefit.*"

In this case, however, the land was mortgaged to prevent a sale for arrears of Government revenue, which is a necessity,<sup>1</sup> and therefore the actual decision in the case is not of much assistance on this point.

The Mahomedan law with respect to this subject is a little different.

Macnaghten in his Principles of Mahomedan Law<sup>2</sup> says, that the *near* guardians<sup>3</sup> have power over the property of the minor for purposes beneficial to him, and<sup>4</sup> that a guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances, *viz.*: 1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will, which cannot be carried into effect without such sale; 5thly,

Power of guardians to sell estates of their wards under the Mahomedan law.

<sup>1</sup> 2 Macnaghten's Hindu Law, Vol. II, chap. xi, case 2, p. 293.

<sup>2</sup> Chap. viii, princ. 6.

<sup>3</sup> See *ante*, Lecture II.

<sup>4</sup> Chap. viii, princ. 14.

where the produce of the property is not sufficient to defray the expenses of keeping it; 6<sup>thly</sup>, where the property may be in danger of being destroyed; 7<sup>thly</sup>, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution. Thus the Mahomedan law, in addition to allowing a sale in the case of urgent necessity, also allows it where a clear advantage is thereby to be gained for the infant.<sup>1</sup>

Although, under the Mahomedan law, the question of legal necessity is an element for consideration in cases of sale of moveable property by the guardian, that question does not necessarily arise, as the Mahomedan law looks to the benefit of the minor, and permits the guardian to dispose of moveable property if it be for the benefit of his ward.<sup>2</sup>

Under the Mahomedan law, every contract entered into by a *near* guardian on behalf, and for the benefit, of the minor, and every contract entered into by a minor with the advice and consent of his *near* guardian, as far as regards his personal property, is valid and binding upon him, provided there be no circumvention or fraud on the face of it.<sup>3</sup>

English  
law.

The English law does not permit the guardian of an infant's estate, under any circumstances, to

<sup>1</sup> *Musst. Bukshun v. Mustt. Maldai Kooeri*, 3 B. L. R. A. C. 423; S. C. *Musst. Bukshun v. Mustt. Doolhin*, 12 W. R. C. R. 337.

<sup>2</sup> *Musst. Syedun v. Syud Velayet Ali Khan*, 17 W. R. C. R. 239.

<sup>3</sup> Macnaghten's Principles of Mahomedan law, chap. viii, prine. 15.

convert the infant's real property;<sup>1</sup> but it allows the guardian to invest the infant's personal property in realty, where such investment is clearly for the infant's benefit.<sup>2</sup> This conversion is, however, only *sub modo*, and for the purposes of succession the property remains personal. Where the guardian is a trustee for the infant under an instrument containing a power of sale, he may, of course, exercise such power independently of the Court.<sup>3</sup>

Where a time is fixed for the sale, the trustee can sell after that time, if it be for the benefit of the infant.<sup>4</sup>

Where the *cestui que trustent* are infants, the trustees, under the power of sale, can give to the purchaser a valid receipt for the purchase-money, and such receipt would bind the infant *cestui que trusts*.<sup>5</sup>

The High Court has the same powers with respect to the estates of infants subject to its ordinary original jurisdiction as were possessed by the English Court of Chancery prior to the year 1726.

And with respect to infants residing in Bengal outside the limits of the ordinary original jurisdiction of the High Court, it would seem that the High

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<sup>1</sup> *Rook v. Worth*, 1 Ves. Sen. 460.

<sup>2</sup> *Ex parte Grimstone*, Amb. 706; *Inwood v. Twyne*, Amb. 417.

<sup>3</sup> Simpson on the Law of Infants, p. 328.

<sup>4</sup> Lewin on Trusts, p. 376, 6th edn.

<sup>5</sup> *Sowarsby v. Lacy*, 4 Mad. 142.

Court possessed original powers over their property similar to those possessed by the Court over the infants residing within the bounds of its ordinary original jurisdiction. As we saw in a previous lecture,<sup>1</sup> the High Court has power, within the Bengal division of the Presidency of Fort William, to appoint guardians for infants and their estates according to the order and course observed in England at the time of the establishment of the Supreme Court. This power would seem to carry with it the same powers over the estates of infants as were then exercised by the English Court of Chancery.

It is also a question whether the Supreme Court, under its general authority, did not possess these powers. If it did, the High Court now possesses them.

The only cases, apparently, where the English Court of Chancery will allow the sale or mortgage of an infant's property is for the purpose of paying necessary expenses which have been incurred with reference thereto, such as necessary repairs and improvements, or to pay off legacies or other charges on the estate, or to pay the costs of a suit relating to the estate, or the expenses of renewing renewable leaseholds.<sup>2</sup>

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<sup>1</sup> Lecture V.

<sup>2</sup> See Simpson on the Law of Infants, pp. 329, 330.



Where the estate of a minor is subject to the Court of Wards, that Court, with the consent of the Board of Revenue, may, in certain cases,<sup>1</sup> sell or mortgage the ward's property.

A manager appointed by the Civil Court under Act XL of 1858 cannot sell or mortgage any immoveable property belonging to his ward without an order of the Civil Court previously obtained.<sup>2</sup>

We have seen that, under the Hindu law at least, the estate of an infant cannot be sold or charged without the existence of a necessity. *Hunooman Pershad Pandey's case*<sup>3</sup> further decides that a person lending money on the security of an infant's estate, or buying that estate, is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,<sup>4</sup> and must satisfy himself as well as he can,<sup>5</sup> and as an honest man,<sup>6</sup> with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,<sup>7</sup> and that circumstances of necessity

<sup>1</sup> Act IV (B. C.) of 1870, sec. 68, *ante*, Lecture III.

<sup>2</sup> Act XL of 1858, sec. 18. As to the effect of a sale or mortgage made without such sanction, see *ante*, p. 180, and *Dabee Dutt Sahoo v. Subodra Bibee*, 25 W. R. C. R. 449.

<sup>3</sup> *Ante*, p. 330.

<sup>4</sup> *Gour Pershad Narain v. Sheo Pershad Ram*, 5 W. R. C. R. 103; *Syed Looft Hossein v. Dursin Lall Sahoo*, 23 W. R. C. R. 424.

<sup>5</sup> *Muthoora Doss v. Kanoo Beharee Singh*, 21 W. R. C. R. 287.

<sup>6</sup> *Looloo Singh v. Rajendur Laha*, 8 W. R. C. R. 364.

<sup>7</sup> *Lalla Bunseedkur v. Koonwar Bindesaree Dutt Singh*, 10 Moo. I. A. 471; S. C., I. Ind. Jur. N. S. 1651; *Trimbak Anant v. Gopalshet bin Mahadshet Mahadu*, 1 Bom. H. C. Rep., 2nd ed. 27; *Mahabeer Pershad Sing v. Dinnreeram Opadhya*, W. R. 1864 C. R. 166.

had occurred which, under the Hindu law, would justify the sale of the property.<sup>1</sup>

But he need not see to the application of the purchase-money.

If he does so enquire and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge;<sup>2</sup> and, under such circumstances, he is not bound to see to the application of the purchase-money.<sup>3</sup> "It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."<sup>4</sup>

The fact of there being a necessity and the pressure on the estate is all that the lender

<sup>1</sup> *Kasheenath Bose v. Chunder Moham Nundee*, 14 S. D. A. 1791.

<sup>2</sup> See also *Sheik Tajooddeen Hossein v. Bhugwanlol Sahoo*, 16 S. D. A. 33; *Mahabeer Pershad Sing v. Dumreeram Opadhya*, W. R. 1864 C. R. 166.

<sup>3</sup> Similar decision in *Radha Kishore Mookerjee v. Mirtoonjoy Gow*, 7 W. R. C. R. 23; *Sukeenath Banoo v. Huro Churn Buruj*, 6 W. R. C. R. 34; *Mahabeer Pershad Sing v. Dumreeram Opadhya*, W. R. 1864 C. R. 166; *Gomain Sircar v. Prannath Goopto*, 1 W. R. C. R. 14.

<sup>4</sup> *Hunooman Pershad Pandey v. Musst. Babooee Munraj Koonwaree*, 6 Moo. I. A. at p. 424; S. C., 18 W. R. C. R. note to p. 81, and 2 Sev. note to p. 253.

need enquire about.<sup>1</sup> He need not enquire into its causes,<sup>2</sup> nor need he investigate as to what money is available towards paying off the debts of the estate,<sup>3</sup> or what is the actual amount required to be borrowed.<sup>4</sup>

Where the lender knows, or by ordinary diligence might have known, that there were other funds available and sufficient for paying off the debt, semble, the sale would be invalid.<sup>5</sup>

The lender must be entirely on his guard. If he is lending for the purposes of a family, he must see whether the family with which he is about to deal or contract be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the co-heirs will be concluded.<sup>6</sup> The debt incurred by the head of a joint Hindu family is, under ordinary circumstances, presumed to be a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property must see that

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<sup>1</sup> *Gunganarain Moytee v. Gopeenath Doss*, 2 Sev. Rep. 251.

<sup>2</sup> *Mohabeer Kooer v. Joolpa Singh*, 16 W. R. C. R. 221.

<sup>3</sup> *Gomain Sircar v. Prannath Goopto*, 1 W. R. C. R. 14.

<sup>4</sup> *Gunganarain Moytee v. Gopeenath Doss*, 2 Sev. Rep. 251; *Kalee Narain Roy Chowdhry v. Ram Coomar Chand*, W. R. 1864 C. R. 99; *Nuffer Chunder Bannerjee v. Guddadthur Mundle*, 3 W. R. C. R. 122.

<sup>5</sup> *Kaleenarain Roy Chowdhry v. Ram Coomar Chand*, W. R. 1864 C. R. 99.

<sup>6</sup> *Strange's Hindu Law*, Vol. I, p. 200; *Dalpatsing v. Nanabhai*, 2 Bom. H. C. Rep. 323.

the transaction is entered into for some common family necessity, or on account of the necessities of the infant.<sup>1</sup>

Lender must not take unfair advantage of guardian.

The lender must take no unfair advantage of the guardian, and where the guardian is a *purdahnashin*, and the purchaser or lender is a man of business, the fact that the guardian has had no independent advice will raise a strong presumption of fraud against the purchaser, whose duty it is to see that she is provided with such advice.<sup>2</sup>

Burden of proof in suit by minor to set aside sale or mortgage.

Where a suit is brought by a minor on coming of age to set aside a sale or mortgage contracted for him by his guardian during his minority, the purchaser or mortgagee must prove that the transaction was entered into in good faith;<sup>3</sup> that he advanced in consideration of the sale or mortgage a sum of money reasonable with reference to the value of the property;<sup>4</sup> that proper enquiries were made by him with respect to the existence of a necessity justifying the sale; and that the result of such

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<sup>1</sup> *Trimbak Anant v. Gopalshet bin Mahadshet Mahadu*, 1 Bom. H. C. Rep., 2nd ed. 27; *Tandavaya Mudali v. Valli Ammal*, 1 Mad. H. C. Rep. 398.

<sup>2</sup> *Lalla Bunseedhur v. Koonwar Bindeseree Dutt Singh*, 10 Moo. I. A. 471; S. C., 1 Ind. Jur. N. S. 165.

<sup>3</sup> See *Roopnarain Sing v. Gugadhur Pershad Narain*, 9 W. R. C. R. 297.

<sup>4</sup> See *Saravana Tevan v. Muttayi Ammal*, 6 Mad. H. Rep. 371; see *post*, pp. 353, 354.

enquiries was such as to satisfy him as an honest man of the existence of such necessity.<sup>1</sup>

In *Hunooman Pershad Pandey's* case,<sup>2</sup> this doctrine is based upon the principle that, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.<sup>3</sup> In that case the Privy Council said: "Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is, *primâ facie*, to support the charge, and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the *Sudder Dewany Adawlut* at Agra, in the case of *Omed Rai v. Heera Lall*,<sup>4</sup> was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular

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<sup>1</sup> *Syed Looft Hossein v. Dursun Lall Sahoo*, 23 W. R. C. R. 424; *Poolunder Singh v. Ram Pershad*, 2 Agra H. C. Reps., 147; *Kasheenath Bose v. Chunder Mohun Nundee*, 14 S. D. A. 1791; and cases, *ante*, p. 345, notes 5, 6, and 7.

<sup>2</sup> *Ante*, p. 330.

<sup>3</sup> See The Indian Evidence Act I of 1872, sec. 106, which provides that "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

<sup>4</sup> 6 S. D. A. N. W. P. 618.

character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with

circumstances, and must be regulated by, and dependent on, them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favor made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

“It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd volume of Morley's Digest, seems to be the foundation of this practice (see also the case of *Brown v. Ram Kunæe Dutt*).<sup>1</sup> It is obvious, however, that it might be unreasonable to require

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<sup>1</sup> 11 S. D. A. Reps. 791.

such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."

Thus, if the mortgagor or purchaser is able to prove the payment of the consideration money, that he made reasonable enquiries as to the existence of the necessity, and that the result of such enquiry was to satisfy him as an honest man of the existence of such necessity, the mortgage or sale would be upheld. Where he can prove the actual existence of the necessity, he need not prove that he made enquiries with respect to it.<sup>1</sup>

Fraud.

This evidence would be considered *prima facie* proof of the *bona fides* of the transaction, subject of course to be rebutted by any evidence showing that the purchaser has acted *malá fide*, or has acted in collusion with the manager or guardian to the injury of the infant.<sup>2</sup> Fraud, practised either in

<sup>1</sup> *Muthoora Doss v. Kanoo Beharee Singh*, 21 W. R. C. R. 287.

<sup>2</sup> See *Hunooman Pershad Pandey v. Musst. Babooee Munraj Koonwaree*, 6 Moo. I. A. 393; S. C., 18 W. R. C. R. note to p. 81, and 2 Sev. Rep. note to p. 253; *Roopnarain Singh v. Gugadhur Pershad Narain*, 9 W. R. C. R. 297; *Gour Pershad Narain v. Sheo Pershad Ram*, 5 W. R. C. R. 103.



collusion with or upon the manager, is sufficient to render invalid a sale which is otherwise unimpeachable.<sup>1</sup>

The Court, in considering whether it will set aside a sale of property made during the minority of the owner, will make a distinction between an innocent purchaser and one tainted with fraud. As the Privy Council observed in the case of *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh*,<sup>2</sup> "the question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other."

Where a mortgagee, whose mortgage was originally untainted with fraud, obtains foreclosure by collusion with the guardian, such foreclosure proceedings would be set aside.<sup>3</sup>

In determining the question of the validity of a sale, adequacy of price is an important point to be

Adequacy  
of price.

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<sup>1</sup> *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh*, 10 Moo. I. A. 454; S. C., 1 Ind. Jur. N. S. 165.

<sup>2</sup> 10 Moo. I. A. 474; S. C., 1 Ind. Jur. N. S. 165.

<sup>3</sup> As to the rights of a purchaser for good consideration without notice of the fraud, see *Khettermonee Dassee v. Kishenmohun Mitter*, Marsh. 313; *Jungeelall v. Shamlall Misser*, 20 W. R. C. R. 120; *Abdool Hye v. Nawab Raj*, 19 W. R. C. R. 196; and *Syed Loof Hossein v. Dursun Lall Sahoo*, 23 W. R. C. R. 424; *post*, Lecture XI.

considered,<sup>1</sup> though the inadequacy of the price is not conclusive proof of *mala fides*.<sup>2</sup>

The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate of the minor,<sup>3</sup> or the fact that a better price might have been obtained for the property, or that others were ready at the time of the sale to have purchased portions of the property at a higher rate than what it fetched,<sup>4</sup> would not nullify a sale to *bonâ fide* purchasers for value, though it would do so where it were shown that the purchasers acted in collusion with the guardian, or exercised an undue influence over him to induce him to prefer them to other creditors.

Mahomedan  
law.

The same rules as laid down in *Hunooman Pershad Pandey's* case with respect to the duty of a purchaser or mortgagee from the guardian of an infant's estate as to enquiry, and with respect to the burden of proving that enquiry, would apply equally where the infant is a Mahomedan, and the transaction is therefore governed by Mahomedan

<sup>1</sup> *Dagdu v. Kamble*, 2 Bom. H. C. Rep. 369; *Khettermonee Dassee v. Kishenmohun Mitter*, Marsh. 313; *Baboo Kumola Pershad Narain Singh v. Nokh Lal Sahoo*, 6 W. R. C. R. 30.

<sup>2</sup> *Baboo Kumola Pershad Narain Singh v. Nokh Lal Sahoo*, 6 W. R. C. R. 30.

<sup>3</sup> *Kool Chunder Surmah v. Ramjoy Surmona*, 10 W. R. C. R. 8.

<sup>4</sup> *Baboo Kumola Pershad Narain Singh v. Nokh Lal Sahoo*, 6 W. R. C. R. 31.

law.<sup>1</sup> In fact, that particular portion of the judgment of the Privy Council is based rather upon the general law affecting the disability of infancy, than on the Hindu law particularly.

The guardian of an infant's estate has power to lease the infant's property, as such power is generally beneficial to the infant;<sup>2</sup> but he cannot, as a rule, grant a lease of the property of his ward beyond the period of the ward's minority.<sup>3</sup>

Power of  
guardian  
to grant  
leases.

He would, however, be justified in leasing the property for a longer period by those circumstances which would justify the sale or mortgage of the estate.<sup>4</sup> Where he does grant such lease, and the necessity or benefit of the minor does not justify the grant, the lease would enure till the expiration of the ward's minority, when it would be voidable by the ward.

A manager appointed by a Civil Court under the provisions of Act XL of 1858<sup>5</sup> cannot, without the sanction of the Court previously obtained, grant a lease for a longer period than five years.<sup>6</sup>

Under Act  
XL of  
1856.

<sup>1</sup> See *Denobundo Pundit v. Syud Mohammed Hossain*, 2 Hay 549; and *Buzrung Sahoy Sing v. Musst. Mantora Chaudhrain*, 22 W. R. C. R. 119.

<sup>2</sup> See *Mangola Debi v. Dinanath Bose*, 4 B. L. R. O. C. 81.

<sup>3</sup> *Baboo Gopeenuth v. Ramjeeun Lall*, 15 S. D. A. Rep. 913; *Bungo Chunder Bose v. Ruheemoollah*, 1 W. R. C. R. 211.

<sup>4</sup> *Oddayto Chunder Koondoo v. Prosunno Coomar Bhattacharjee*, 2 W. R. C. R. 325; *Nubokishen Mookerjee v. Kalee Pershad Roy*, 15 S. D. A. 607.

<sup>5</sup> See *ante*, Lecture IV.

<sup>6</sup> Act XL of 1858, sec. 18. As to the effect of an unsanctioned lease for more than five years, see *Mahomed Reza v. The Collector of Chittagong*, 15 W. R. C. R. 116.

Under  
Court of  
Wards.

Where an infant is a ward of the Court of Wards, no lease given for a term exceeding ten years, or beyond the period of the ward's minority, is valid without the sanction of the Board of Revenue.<sup>1</sup>

Surrender  
and renew-  
al of leases  
in which  
infants are  
interested.

In cases governed by the English law as administered by the High Court, where an infant is entitled to any lease of property in Calcutta made for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, such infant, or his or her guardian or other person on his behalf may apply to the High Court by petition or motion in a summary way; and by the order and direction of the Court, such infant or his guardian, or any person appointed in the place of such guardian by the Court, may be enabled from time to time, by deed or deeds, to surrender such lease, and accept and take, in the place and for the benefit of such infant, one or more new lease or leases of the premises comprised in such lease so surrendered, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term of years absolute, as was mentioned or contained in the lease so surrendered at the making thereof, or otherwise, as the Court may direct.<sup>2</sup>

<sup>1</sup> Act IV (B. C.) of 1870, sec. 9; see *ante*, Lecture III.

<sup>2</sup> See Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

Every sum of money and other consideration paid by any guardian or other person as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant for whose benefit the lease is renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the Court shall direct or determine.<sup>1</sup>

Charges attending renewal to be charged on the estates as the Court shall direct.

Every lease so renewed shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease so surrendered was or would have been subject to in case such surrender had not been made.<sup>2</sup>

New leases to be to the same uses.

Where any such infant might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons, such infant, or his guardian in the name of such infant, may, by the direction of the Court, to be signified by an order to be made in a summary

Infants empowered to grant renewal of leases.

<sup>1</sup> See Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

<sup>2</sup> *Idem.*

way upon the petition of such infant or his guardian, or of any person entitled to such renewal, from time to time accept of a surrender of such lease, and make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof or otherwise as the Court by such order shall direct.<sup>1</sup>

Court may  
authorize  
leases by  
infants.

The Court may also authorize such infants or their guardians to make leases of lands belonging to such infants when it is for the benefit of the estate.<sup>2</sup>

Purchase  
by guar-  
dian.

A guardian may, if it be for the benefit of the infant, expend money belonging to the infant in the purchase of immoveable or other property; but he is not entitled to mortgage or sell the lands of the infant for the purpose of purchasing such property.<sup>3</sup>

It has been held<sup>4</sup> that, when a purchaser at a sale in execution is named in the sale-certificate as "mother and guardian of her infant son," the title to the property vests by the certificate in the minor absolutely.

<sup>1</sup> Act XXIV of 1841, secs. 1 and 5, extending 11 Geo. IV and 1 Will. IV, cap. LXV, to cases governed by the English law within the jurisdiction of the Supreme Court.

<sup>2</sup> See 11 Geo. IV and 1 Will. IV, cap. LXV, sec. 17, extended by Act XXIV of 1841 to cases governed by the English law within the jurisdiction of the Supreme Court.

<sup>3</sup> See *Nubo Kant Doss v. Syud Abdool Juleel*, 20 W. R. C. R. 372; *Ex parte Grimstone*, Amb. 706.

<sup>4</sup> *Hemanginee Dossee v. Jogendro Narain Roy*, 12 W. R. C. R. 236.

A guardian can apparently exercise a right of pre-emption on behalf of his ward, provided there be funds belonging to the ward available for the purpose.<sup>1</sup>

A guardian is entitled to lay out money belonging to his ward in repairing the infant's house, or in discharging incumbrances upon his estate.<sup>2</sup>

There is a question of no small difficulty connected with the subject of the present lecture, namely, whether Section 18 of Act XL of 1858 has any effect upon the powers of guardians who have not taken out certificates under that Act.<sup>3</sup>

That Act has no operation in Calcutta,<sup>4</sup> and the powers of certificate-holders in respect of property in Calcutta are not affected by the provisions of that Act.<sup>5</sup>

The 18th section of Act XL of 1858 provides as follows: "Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor. But

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<sup>1</sup> *Nubo Kant Doss v. Syud Abdool Juleel*, 20 W. R. C. R. 372.

<sup>2</sup> *Ex parte Grimstone*, Amb. 705.

<sup>3</sup> The provisions of Act XL of 1858 have been discussed in Lecture IV.

<sup>4</sup> *Ante*, pp. 147 & 148.

<sup>5</sup> *Gopalnarain Mozoomdar v. Muddomuttee Gooptee*, 14 B. L. R. 21.

no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained."

In one case<sup>1</sup> it was held by a Division Bench of the High Court, composed of H. V. Bayley and Dwarkanath Mitter, JJ., that, under that section, it is essential for a person to obtain a certificate before he can deal with the claims, debts, and liabilities attaching to the estate of the minor; and in another case,<sup>2</sup> Mr. Justice Birch, sitting alone, held that a *de facto* guardian has not in that capacity larger powers than one appointed under Act XL of 1858, and is not competent to grant a lease for more than five years without an order of the Civil Court previously obtained.

There is also a decision<sup>3</sup> by Mr. Justice Phear, in which he holds that the *de facto* manager of the estate of a lunatic has no greater powers than a manager appointed under Act XXXV of 1858, which enacts, for the protection of lunatics and their estates, provisions in many respects similar to those which Act XL of 1858 makes applicable to minors and their estates.

Besides these decisions, there is one to the con-

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<sup>1</sup> *Tusneef Hossein v. Bibee Sookhoo*, 14 W. R. C. R. 453.

<sup>2</sup> *Khellernath Dass v. Ram Jadoo Bhattacharjee*, 21 W. R. C. R. 49.

<sup>3</sup> *Court of Wards v. Kupulmun Sing*, 10 B. L. R. 369.



trary effect by Mr. Justice L. S. Jackson and Mr. Justice Dwarkanath Mitter.<sup>1</sup>

With reference to the 18th section of Act XL of 1858, Mr. Justice Markby, in his lectures on Indian Law,<sup>2</sup> observes, "The provisions of this section only relate to a certificate-holder. A person who had assumed charge of an estate without having obtained a certificate, could not claim the same absolute discretion with regard to the moveable property and the income of the landed property which is thereby conferred; and the validity of his acts would have to be determined by the general principles which govern the relations of a minor to the manager of his estate."

With the exception of a provision that a person not possessing a certificate under that Act cannot, without the leave of the Court, institute or defend any suit connected with a minor's estate,<sup>3</sup> Act XL of 1858 is an enabling and not a disabling statute.<sup>4</sup> By its provisions with respect to suits, the Act offers an inducement to guardians to bring their

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<sup>1</sup> *Musst. Shooghury Koer v. Boshisht Narain Singh*, 8 W. R. C. R. 331. See also judgment of Markby, J., in *Gopal Narain Mozoomdar v. Muddoomutty Gooptee*, 14 B. L. R. 21.

<sup>2</sup> At p. 81.

<sup>3</sup> Sec. 3, see *ante*, Lecture IV.

<sup>4</sup> *Musst. Shooghury Koer v. Boshisht Narain Singh*, 8 W. R. C. R. 381; see *Lalla Boodhmul v. Lalla Gowree Sunkur*, 4 W. R. C. R. 71. In Bombay the law in this respect is different, as by the Bombay Act XX of 1864 the property of the minor is vested in the Civil Court. See *Baihesar v. Bai Ganga*, 8 Bom. H. C. Rep. A. C. J. 31.

wards under the superintendence of the Civil Court; but it nowhere provides that their powers are to be in any way altered if they do not bring them under such superintendence. This seems to show that Section 18 of Act XL of 1858 has no effect upon the powers of managers who have not taken out a certificate under that Act.

Bonds executed by guardians.

Bonds executed by guardians on behalf of their wards will bind their wards in cases where the bond was executed under circumstances similar to those which would justify a mortgage or sale of the minor's property.<sup>1</sup> Where a guardian has executed bonds on behalf of his ward, he cannot be held personally liable on them, even though they may not bind the ward.<sup>2</sup>

Ancestral trades.

Where an infant is a member of a joint Hindu family, and as such entitled to a share in an ancestral trade, the manager of the family can, so long as it be beneficial to the infant, continue the trade on the infant's behalf.

In carrying on such a trade, infant members of the family will be bound by the acts of the manager which are necessarily incident to, and flowing out of, the carrying on of such trade.<sup>3</sup> Minor members

<sup>1</sup> *Deoputtee Koonwar v. Dhumoo Lall*, 11 W. R. 240.

<sup>2</sup> *Rughubindurnarain Roy v. Issurchunder Roy*, 10 S. D. A. 611. See *post*, Lecture XI.

<sup>3</sup> *Ramlal Thakursidas v. Lahmichand Muniram*, 1 Bom. H. C. Reps. App. li., followed in *Johurra Bibee v. Sreegopal Misser*, I. L. R. 1 Cal. Ser. 470. As to the liability of an infant partner, see Act IX of 1872, secs. 247, 248.

of a joint family are only bound by such acts of the manager as are necessary for the material existence of the undivided family, or for the preservation of the family property; and a compromise between co-partners of partnership accounts and differences by a transfer and division of partnership property is not such a necessary act, but is one which is left to be dealt with by the ordinary rules of law, and which must be shown clearly to be of benefit to the infant before the compromise will be enforced.<sup>1</sup>

As soon as he sees that the interests of the infant are likely to be prejudiced by his property remaining in the trade, it becomes the duty of the guardian of the infant to take steps to effect the withdrawal of the infant's property from the partnership.

In short, all transactions which guardians enter into on behalf of their wards must secure to the latter some demonstrable advantage, or avert some obvious mischief in order to obtain recognition from the Court.<sup>2</sup> They must show the strictest good faith, and must be based on actual necessity, and not on calculations of possible benefit.<sup>3</sup>

Where a guardian compromises the claims of an infant, such compromise will not be upheld except on

Compromises by guardians.

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<sup>1</sup> *Ramlal Thakursidas v. Lakmichand Muniram*, 1 Bom. H. C. Reps. App. li.

<sup>2</sup> *Dharmaji Vaman v. Gurrav Shrinivas*, 10 Bom. H. C. Reps. 311.

<sup>3</sup> *Bodhmul v. Gouree Sunkur*, 6 W. R. C. R. 16; *Lalla Boodhmul v. Lalla Gouree Sunkur*, 4 W. R. C. R. 71.

proof of necessity, or of clear benefit to the infant.<sup>1</sup> There must also be an entire absence of fraud.

The power of the next friend or guardian *ad litem* to bind an infant by a compromise entered into by him on behalf of the infant depended entirely, before the passing of the new Civil Procedure Code,<sup>2</sup> upon whether such compromise was for the benefit of the infant and was free from fraud,<sup>3</sup> except that a suit on the Original Side of the High Court could not be compromised without the leave of that Court.<sup>4</sup>

Where, however, the compromise had been confirmed by a decree, or where a length of time has elapsed between the time when the infant attained majority and the date of institution of the suit to

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<sup>1</sup> *Kedarnath Mookerjee v. Mathuranath Dutt*, 2 B. L. R. A. C. 17 and 126; S. C., 10 W. R. C. R. 59; *Ranee Roshun Jahan v. Rajah Syed Enaet Hossein*, 5 W. R. C. R. 4; and W. R. 1864 C. R. 83; *Lalla Boodhmul v. Lalla Gouree Sunkur*, 4 W. R. C. R. 71; *Bodhmul v. Gouree Sunkur*, 6 W. R. C. R. 16; *Ramnarain Poramanick v. Sreemutty Dossee*, 1 W. R. C. R. 281; *Baboo Huree Proshad Jha v. Muddunmohun Thakoor*, 17 W. R. C. R. 217; *Roteekant Bose v. Nobinchunder Bose*, 2 Hay 620; *Ramlal Thakursidas v. Lakhmi Chand Muniram*, 1 Bom. H. C. Repts., 2nd edn., App. 51; *Baboo Gopeenath v. Ramjeevan Lall*, 15 S. D. A. 913.

<sup>2</sup> Act X of 1877.

<sup>3</sup> *Dharmaji Vaman v. Gurav Shrinivas*, 10 Bom. H. C. Repts. 311; *Ramlal Thakursidas v. Lakhmi Chand Muniram*, 1 Bom. H. C. Repts., 2nd edn., App. li. See cases, *ante*, p. 352 note 2, and *Moulvie Abdool Ali v. Mozuffer Hossein Chowdhry*, 16 W. R. P. C. 22; *Baboo Lekraj Roy v. Baboo Mahtab Chand*, 14 Moo. I. A. 393; S. C. 10 B. L. R. 35, and 17 W. R. C. R. 117; *Baboo Gopeenath v. Ramjeevan Lall*, 15 S. D. A. 913.

<sup>4</sup> See Rule 35 of Rules of 6th June, 1874.

set aside the compromise, the Court would not set aside such compromise without clear proof of fraud or collusion.<sup>1</sup>

The Code of Civil Procedure<sup>2</sup> provides<sup>3</sup> that "no next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement entered into without the leave of the Court shall be voidable against all parties other than the minor." This provision does not apply to any minor for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.<sup>4</sup>

This provision in the Civil Procedure Code seems to render absolutely void any compromise made without the leave of the Court, though it does not prevent the minor from disputing a compromise, even though sanctioned by the Court, on any of the grounds for which he could before that Act came into force have avoided a compromise entered into on his behalf.

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<sup>1</sup> *Baboo Lekraj Roy v. Baboo Mahtab Chand*, 14 Moo. I. A. 393; S. C. 10 B. L. R. 35, and 17 W. R. C. R. 117.

<sup>2</sup> Act X of 1877.

<sup>3</sup> Sec. 462.

<sup>4</sup> See sec. 464. "Local law" apparently means (as far as Bengal is concerned) Act XL of 1858; see *ante*, Lecture III, as to the compromise of claims by the Court of Wards.

It has been held by the Madras High Court<sup>1</sup> that a guardian may bind his ward by referring to a panchayet of their caste a question of customary partition.

Powers of guardian with respect to person of ward.

The powers of a guardian over the person of his ward were considered in the last lecture.<sup>2</sup> In addition to those powers, the guardian has power to bind his ward apprentice to a trade. Act XIX of 1850, which contains the whole law on this subject applicable to this country, provides as follows:—

Apprenticing of child between 10 & 18 years old.

“Sec. 1. Any child above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or in the case of a female, beyond the time of her marriage.

Evidence of age in questions as to right of service.

Sec. 2. The age set forth in the contracts shall be evidence of the age of the child in all questions which arise as to the right of the master to the continuance of the service.

Powers of Magistrate or Justice acting for orphans, &c.

Sec. 3. Any Magistrate or Justice of the Peace may act with all the powers of a guardian under this Act on behalf of any orphan or poor child

<sup>1</sup> *Timmahal v. Subbammal*, 2 Mad. H. C. Reps. 47.

<sup>2</sup> *Ante*, pp. 303-309.

abandoned by its parents, or of any child convicted before him or any other Magistrate, of vagrancy, or the commission of any petty offence.

Sec. 4. An orphan or poor child, brought up by any public charity, may be bound apprentice by the governors, directors or managers thereof, as his or her guardians for this purpose.

Apprenticing of child brought up by public charity.

Sec. 5. Any such boy may be bound as an apprentice in the sea service to any of Her Majesty's subjects, being the owner of any registered ship belonging to and trading from any port in the territories under the Government of India, which has been declared to be a registering port under Act X of 1841, to be employed in any such ship, the property of such person, commanded by a British subject, and, while so employed, to be taught the craft and duty.

Apprenticing of such boy in sea service.

Sec. 7. The master or commander of any ship in which an apprentice bound to the sea service shall be appointed to serve by the party to whom he is bound, shall be deemed the agent of such party for the purpose of this Act.

Sec. 8. Every contract of apprenticeship shall be in writing, according to the form given in Schedule A. annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

Form and contents of contract of apprenticeship.

Signatures  
to contract.

Sec. 9. Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more, at the time of binding ; but, when the apprentice is bound by the governors, directors, or managers of a public charity, the signature of two of them, or of their secretary or officer, shall be sufficient on behalf of the persons binding the apprentice.

Contract  
not valid  
unless exe-  
cuted as  
prescribed,  
and depo-  
sited.

Sec. 10. No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed, or, if the apprentice is bound to the sea service, in the office of the person appointed under Act X of 1841 to make registry of ships at the port where the apprentice is to begin his service ; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate or registering officer.

Copies to  
be given to  
parties.

Alteration  
of terms  
of service  
and termi-  
nation of  
contract.

Sec. 11. The terms of service may be changed at any time during the apprenticeship, or the contract may be determined with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice, if he is above the age of fourteen years ; provided that the



changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties, according to section 8<sup>1</sup> of this Act ; and the Magistrate or registering officer shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

Sec. 12. The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice, if he is above the age of fourteen years, assign such apprentice to any other person who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof; provided that such person shall, by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned, to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively ; and every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate or registering officer according to the form given in Schedule (B) annexed to this Act.

Assign-  
ment of  
apprentice  
to new  
master.

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<sup>1</sup> *Sic.*, read sec. 9.

Power of  
Magistrate  
in case of  
complaint  
by appren-  
tice against  
master.

Sec. 13. Upon complaint made to any Magistrate in the said territories<sup>1</sup> by or on behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated on the summons, to answer the complaint, and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than Rs. 50 was paid, not exceeding Rs. 200 ; and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels; and if the offender shall not be the master, but his agent, by distress and sale of the goods and chattels of the master also.

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<sup>1</sup> See sec. 5, *ante*, p. 367.

Sec. 14. No contract of apprenticeship shall be cancelled, nor shall any master or his agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour, given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child; and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice for which he would be liable to be punished, had it been against his child, whether or not any proceeding be taken for cancelling the contract of apprenticeship.

Power of master or his agent to chastise apprentice.

Liability of master or agent for assault, &c.

Sec. 15. Upon complaint made to any Magistrate by or on behalf of the master of any apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order; and, if the offender be a boy of not more

Power of Magistrate in case of complaint by master against apprentice.

than fourteen years of age, may order him to be privately whipped; or, if the offender be a girl, or in the case of any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

Cancel-  
ment of  
contract  
for mis-  
conduct of  
apprentice.

Sec. 16. Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and on the demand of the master, the Magistrate may order the contract of the apprenticeship to be cancelled, whether or not the charge is proved, but only with the consent of the apprentice and of his father or guardian, if the charge is not proved, and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied, under the direction of the Magistrate, for behoof of the apprentice.

Appropri-  
ation of sum  
recovered  
for appren-  
tice on can-  
celment of  
contract.

Sec. 17. The Magistrate may order any sum received for behoof of the apprentice on cancelling the contract, to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

Sec. 18. No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act, unless it be brought within one month after the cause of complaint arose; or, if the cause of complaint arose on boardship during a voyage, within one month after the arrival thereof at a port or place in the said territories: and no Magistrate shall entertain a complaint on the part of an apprentice against his master, or the agent of his master, under this Act, unless it be brought within three months after the cause of complaint arose; or, if the cause of complaint rose on boardship during a voyage, within three months after the arrival thereof at a port or place in the said territories.<sup>1</sup>

Limitation of complaint of master against apprentice; of apprentice against master.

Sec. 19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined, and a proportionate part, corresponding to the unexpired portion of the term, of any premium which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been

Effect of death of master during apprenticeship.

Offer by representative of master to continue apprenticeship.

<sup>1</sup> See sec. 5, *ante*, p. 367.

employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

Offer to be  
certified on  
original  
contract  
copies.

Sec. 20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors and administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate or registering officer; and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

Mainte-  
nance of  
apprentice  
whose mas-  
ter dies.

Sec. 21. Any apprentice bound under the Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months, from and after the death of his master, out of the assets left by him; provided that during such three months such apprentice shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they shall appoint.

Effect of  
insolvency  
of master  
during ap-  
prentice-  
ship.

Sec. 22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act

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<sup>1</sup> *Sic.*, read 'or.'

of insolvency during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship; and if any premium was paid on binding him as an apprentice, he or the person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent.

Sec. 23. For the purposes of this Act all British subjects, wherever or of whatever parents born, as well as other persons in the territories under the Government of India, without the towns of Calcutta and Madras, and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and Magistrates of India.

Persons  
amenable  
to juris-  
diction of  
Magis-  
trate's  
Court.

Sec. 24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order."

Appeal  
from orders  
of Mofussil  
Magis-  
trates.

The father of an infant, or a person to whom he has delegated his authority,<sup>1</sup> as for instance, a tutor or schoolmaster, is entitled to chastise the infant moderately, or to put constraint upon him for the purpose of correction.<sup>2</sup>

Constraint  
and correc-  
tion of in-  
fants.

<sup>1</sup> *Re Sutor*, 2 Foster and Fin. 267.

<sup>2</sup> Mayne's Indian Penal Code, 9th edn., p. 286.

## LECTURE XI.

DECREES AGAINST INFANTS, RATIFICATION OF ACTS OF GUARDIAN, LIMITATION OF SUITS, AVOIDANCE OF ACTS OF GUARDIAN, AND LIABILITY OF GUARDIAN.

ALL acts of a guardian strictly within his powers, and done in good faith, bind an infant and his estate.<sup>1</sup> Where the act of the guardian is a reasonable one, and such as the infant might, if of age, prudently do for himself, it will be upheld.<sup>2</sup>

The infant must on coming of age satisfy all necessary debts incurred by his guardian,<sup>3</sup> and he will be bound by all charges on his estate, or sales of portions of his property, which were properly entered into by his guardian on his behalf during his minority.<sup>4</sup>

How far  
decrees  
bind in-  
fants.

If he is properly represented,<sup>5</sup> and there be no fraud or collusion on the part of his guardian or of

<sup>1</sup> *Huroochunder Chowdhry v. Bungsee Mohun Doss*, 1 W. R. M. A. 16; *Gireewur Singh v. Muddun Lall Doss*, 16 W. R. C. R. 252. A guardian can give receipts for debts due to his ward: *Motee Ram Sahoo v. Nawab Khuleel-ool-lah*, 2 Agra H. C. Rep. 338.

<sup>2</sup> *Temmahal v. Subbammal*, 2 Mad. H. C. Rep. 47; *Pierson v. Shore*, 1 Atk 481.

<sup>3</sup> See Act IX of 1872, sec. 68, *ante*, Lecture VIII; Macnaghten's Principles of Mahomedan Law, chap. xi, para. 6.

<sup>4</sup> See *ante*, Lecture X, as to the power of guardians to sell and encumber the property of their wards; *Issur Chunder Rai v. Ragub Indernarain*, 16 S. D. A. 349 and 611.

<sup>5</sup> *Jungee Lall v. Sham Lall Misser*, 20 W. R. C. R. 120; *Musst. Khooshalo v. Subsookh*, 1 Agra H. C. Rep. 175; see *post*, Lecture XII, as to the representation of infants in suits.



the opposite party, an infant is as much bound by the decrees made in suits, to which he is a party, as if he were of full age.<sup>1</sup> In *Gregory v. Molesworth*,<sup>2</sup> Lord Hardwicke said that it was right for Courts of Equity "to follow the rule of law, where it is held, an infant is as much bound by a judgment in his own action as if of full age; and this is general, unless gross laches or fraud and collusion appear in the *prochein amy*, then the infant might open it by a new bill."

No proceeding in a suit will bind an infant, unless he be properly represented therein.<sup>3</sup>

Provided that the infant be properly represented, and there be no fraud or laches on the part of his guardian, an infant is equally bound by a decree, whether it be or be not for his benefit.<sup>4</sup>

Where the decree be such as not to bind the infant, all proceedings under it will be liable to be set aside by the minor, and an execution sale even to a *bona fide* purchaser will not, under these circumstances, bind the minor, at any rate, where such purchaser

When  
decree set  
aside, ef-  
fect on sub-  
sequent  
proceed-  
ings.

<sup>1</sup> *Modhoo Soodun Singh v. Rajah Prithee Bullub Paul*, 16 W. R. C. R. 231; *Mahbul Ali v. S. M. Masnad Bibi*, 3 B. L. R. A. C. J. 54.

<sup>2</sup> 3 Atk. 626; see also *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 631.

<sup>3</sup> *Nund Coomar Futtehdar v. Bunso Gopal Sahoy*, 23 W. R. C. R. 342.

<sup>4</sup> See *Wall v. Bushby*, 1 B. C. C. 484, in which it was held that a decree made by consent bound infant parties to the suit, although there had been no reference as to whether such decree would be for their benefit.

at or before the time of the sale received notice that the minors were not bound by the decree.<sup>1</sup>

Where the purchaser has no such notice, he will not generally, if he has acted *bonâ fide*, be required to give up his purchase,<sup>2</sup> but this question depends entirely upon the circumstances of each particular case. It is for the Court to say in each case whether it will be in accordance with the principles of justice, equity, and good conscience that the sale ought to be set aside or not.<sup>3</sup> Where the purchaser has been guilty of fraud, which had brought about the sale, the Court will set aside the sale.<sup>4</sup>

In one case,<sup>5</sup> a Division Bench<sup>6</sup> of the High Court seem to have held that a sale in execution of a decree would not bind a minor, unless the decree be such as to bind him; but in another case,<sup>7</sup> Couch, C. J., said, "We do not think that the parties who are present at the sale are bound to refer

<sup>1</sup> *Jungee Lall v. Shamlall Misser*, 20 W. R. C. R. 120; *Dabee Dutt Sahoo v. Subodra Bibee*, 25 W. R. C. R. 449.

<sup>2</sup> See *Khettermonee Dussee v. Kishenmohun Mitter*, Marsh. 313; S. C. 2 Hay 196; see also *Alfootoonissa v. Goluck Chunder Sen*, 15 B. L. R. note to p. 353; S. C. 22 W. R. C. R. 77; *Natha Hari v. Jamni*, 8 Bom. H. C. Rep. A. C. J. 37.

<sup>3</sup> *Abdool Hye v. Nawab Raj*, 9 W. R. C. R. 196; see *Jan Ali v. Jan Ali Chowdhry*, I B. L. R. A. C. 56; S. C. 10 V. R. C. R. 154.

<sup>4</sup> *Lalla Bunseedhur v. Koonwar Bindeseree Dutt Singh*, 10 Moo. I. A. 454; S. C. 1 Ind. Jur. N. S. 165, ante, p. 353.

<sup>5</sup> *Syed Lootf Hossein v. Dursun Lall Sahoo*, 23 W. R. C. R. 424.

<sup>6</sup> Pontifex and Morris, JJ.

<sup>7</sup> *Shaikh Abdool Kureem v. Syud Jaun Ali*, 18 W. R. C. R. 56.

to the decree, and must be considered as knowing its contents, unless they are stated in the notification of sale, in fact, the decree would not ordinarily be there to refer to."

Where any portion of the proceeds of a sale had been applied in any way for the benefit of the minor, the sale will not be set aside, except such sum, which has been so applied, be refunded by the minor.<sup>1</sup>

Where a person, who has taken from a guardian or other person acting on a minor's behalf a mortgage of the property of such minor, has obtained by a decree a foreclosure of such property, he is not thereby placed in any better position with reference to the minor. In a suit by the minor to set aside the mortgage transaction and the foreclosure decree, the *onus* of proving the *bona fides* of the transaction lies to the same extent upon him<sup>2</sup> as upon a mortgagee who has not obtained such decree.<sup>3</sup>

It was held by the Supreme Court<sup>4</sup> that an infant may, under certain circumstances, before attaining majority, make a new defence to a suit by another guardian, but that the discretion of the Court to permit him to do so should be sparingly exercised, and that not until he has fully satisfied the Court that

<sup>1</sup> *Hamir Singh v. Musst. Zakia*, 1 I. L. R. All. Ser. 57.

<sup>2</sup> *Buzrung Sahoy Singh v. Musst. Mantora Chowdhraïn*, 22 W. R. C. R. 119.

<sup>3</sup> See *ante*, p. 348.

<sup>4</sup> *Nistareenee Dabee v. Ramnarain Mookerjee*, 3 T. and B. 31; see *Bennett v. Lee*, 2 Atk. 528; *Kelsall v. Kelsall*, 2 M. & K. 409.

he had been prevented by incapacity or other circumstances from adducing the additional evidence at an earlier period. This decision, as well as the English decisions on which it was based, seems to have been founded on the old practice of giving an infant a day after the attainment of his majority for the purpose of showing cause against a decree passed against him during his infancy.

Course to  
be pursued  
by person  
impeach-  
ing decree  
made  
during his  
minority.

Where it is possible that by a re-consideration of the judgment in a suit to which a minor was a party, the rights of the minor, lost by the decree, can be restored, the proper course to pursue is for the minor to apply to the Court for a review of its judgment.<sup>1</sup>

Where, however, such course would not restore the minor to the position in which he was placed before the decree, or where the prejudice to the minor's interests arises from transactions growing out of the decree and of such a nature that a mere review of judgment would prove utterly ineffectual, his only remedy is to proceed by a suit against the persons in possession of his rights.<sup>2</sup>

Admis-  
sions,

A decree will not bind an infant defendant to a suit, unless the whole case be proved against him. His guardian cannot make admissions on his behalf,

<sup>1</sup> See *Dabee Dutt Sahoo v. Subodra Bibee*, 25 W. R. C. R. 449; Act X of 1877, secs, 623-630; see Act XV of 1877, sched. 2, arts. 162 & 173.

<sup>2</sup> *Dabee Dutt Sahoo v. Subodra Bibee*, 25 W. R. C. R. 449. As to the limitation for such suits, see Act XV of 1877, sched. 2, arts. 44, 95, & 144.

though of course he would be bound by the admissions of his predecessor in title.

Under English law an infant is not bound by any admissions made on his behalf in a suit to which he is a party. In one case,<sup>1</sup> however, Phear, J., said: "We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot on his behalf admit facts essential to his adversary's case. It is, however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation."

<sup>1</sup> *Syed Abdool Hye v. Baboo Banee Pershad*, 21 W. R. C. R. 228. An infant is apparently not bound by the statements of fact contained in a special case submitted for the opinion of the Court, unless such statements are substantiated by evidence. In England, an infant is not bound by a special case unless leave has been given by the Court to set it down for hearing, and such leave cannot be given unless the Court be of opinion that it is proper that the question raised thereon shall be determined thereon, and be satisfied by affidavit or other sufficient evidence that the statements contained therein, so far as they affect the interest of the infant, are true (13 & 14 Vict., c. 35, secs. 11 & 13); but there is no such provision in the Civil Procedure Code (Act X of 1877, secs. 527—531). As to compromises of suits by or against infants, see *ante*, p. 365. Under rules 35 and 63 of the High Court (Original Side) Rules of 9th February, 1875, all suits against infants must be taken as defended.

Effect of  
negligence,  
&c. of  
guardian.

Though an infant is, as a rule, bound by a suit brought on his behalf by his guardian, when he comes of age he is not precluded from suing in his own name for anything that his guardian or next friend, either through ignorance, inadvertence, or negligence has omitted to prosecute,<sup>1</sup> even where the guardian brought a suit, but did not claim enough in that suit. But where a guardian has by negligence allowed the minor's right of action to be barred by limitation,<sup>2</sup> the minor cannot after attaining majority bring the suit, but must suffer by the *laches* of his guardian.<sup>3</sup> A minor is not bound by a sale in execution, if his rights and interest in the property are not expressed to be sold ;<sup>4</sup> but where he has benefited to any extent by the decree, or by the sale in execution, the purchaser has to that extent an equitable claim against the minor.<sup>5</sup>

Ratifi-  
cation of  
guardian's  
acts.

However much a guardian may have exceeded his powers, or otherwise acted improperly in his

<sup>1</sup> *Kaylas Chunder Sircar v. Gooroo Churn Sircar*, 3 W. R. C. R. 43 ; *S. M. Aporajita Debia v. Panchcowree Kyburto Doss*, 20 W. R. C. R. 236.

<sup>2</sup> See *post*, p. 390, as to the effect of minority on the limitation of suits.

<sup>3</sup> *Annundee Koonwar v. Takoor Pandee*, 4 W. R. M. A. 21 ; S. C. 1 Ind. Jur. N. S. 31.

<sup>4</sup> *Shaikh Abdool Kurreem v. Syud Jaun Ali*, 18 W. R. C. R. 56 ; *Sirdar Dyal Singh v. Baboo Ram Buddon Singh*, 17 W. R. C. R. 454 ; *Netye Roy v. Odeet Roy*, 10 W. R. C. R. 241 ; see *Denobundo Pundit v. Syud Mahomed Hossein*, 2 Hay, 549.

<sup>5</sup> *Sirdar Dyal Singh v. Baboo Ram Buddon Singh*, 17 W. R. C. R. 454.

trust, his acts will be rendered binding on the infant by being ratified by him, after he has attained majority<sup>1</sup> and has full knowledge of all the facts connected with the transaction so ratified. An infant after coming of age can adopt any of the acts of his guardian on his behalf, whether they be or be not for his benefit.<sup>2</sup>

It is not easy to lay down any distinct rule as to what amounts to a ratification ; but as Mr. Simpson points out in his work on the Law of Infants,<sup>3</sup>

What amounts to a ratification.

<sup>1</sup> *Kumurooddeen Shaikh v. Shaikh Bhadoo*, 11 W. R. C. R., 134, Macpherson on Mortgages, 6th edn., p. 23.

<sup>2</sup> *Surendronath Roy v. Banee Madhub Mullick*, Suth. S. C. C., Ref. 19.

<sup>3</sup> Page 65.

The Indian Contract Act (IX of 1872) provides :—

*Sec. 3.* The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

*Sec. 4.* The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete—

As against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor.

As against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete—

As against the person who makes it, when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it.

As against the person to whom it is made, when it comes to his knowledge.

*Sec. 5.* A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication

“there must be some act on the part of the infant after majority, which recognises as binding or valid what would otherwise not be so.” Before majority, no ratification or avoidance is valid, as an infant cannot make a conclusive election.

An acknowledgment of the guardian's acts, admitting himself liable on account of them,<sup>1</sup> or acting in such a way as to lead any one to suppose that he had ratified them,<sup>2</sup> would amount to a ratification.

Where, knowing the facts, the minor after attaining majority receives any benefit from the act of the guardian, as for instance, where he accepts rents under a lease,<sup>3</sup> which had been made by his guardian during his minority, he cannot afterwards repudiate that act of the guardian.

Where  
infant  
acquainted  
with facts,  
slight evi-  
dence suffi-  
cient.

In fact, where the infant, after attaining majority, becomes fully acquainted with all the facts, very slight evidence of acquiescence will be treated as a

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of the acceptance is complete as against the acceptor, but not afterwards.

Sec. 66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules as apply to the communication or revocation of a proposal.

<sup>1</sup> *Hurrochunder Chowdry v. Bungseemohun Doss*, 1 W. R. M. A. 16; *Soudut Alee Khan v. Khajuh Aleemoollah*, 9 S. D. A. Reps. 494; *C. C. C. V. Reddyer v. Rajuh R. S. Jyengar Bahadoor*, 8 Moo. I. A. 319.

<sup>2</sup> *Kalee Sunkur Sannyal v. Denendro Nath Sannyal*, 23 W. R. C. R. 68; see Act I of 1872, sec. 115.

<sup>3</sup> *Ram Chunder Sircar v. Pran Gobind Boishnub*, 25 W. R. C. R. 71; *Ashfield v. Ashfield*, Noy. 92.



ratification.<sup>1</sup> In one case,<sup>2</sup> where in a suit to set aside a sale effected by the plaintiff's mother during his minority, it appeared that the plaintiff, eleven months after attaining his majority, signed for his mother a written statement in another suit, to the effect that the property had been sold by her to the defendant, and that he in that suit conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed, it was held that he must be considered to have acquiesced in, and to have ratified, the sale. In another case<sup>3</sup> the defendants on attaining majority, being desirous of avoiding payment of certain bonds, which had been executed during their minority by their guardian, were advised that they could only do so by instituting a suit to which the guardian must be a party, and in which a settlement of his accounts would be required; but as the guardian was their spiritual guide, and had been their father's also, instead of instituting a suit against him, they thought it better to come to terms with the plaintiff in order to obtain time for the payment of the debt by instalments, and a *kistbundee* was accordingly executed. It was held by the Privy Council that

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<sup>1</sup> See *C. C. C. V. Reddyer v. Rajah R. S. Jyengar Bahadoor*, 8 Moo. I. A. 319.

<sup>2</sup> *Kebul Kristo Doss v. Ram Coomar Shah*, 9 W. R. C. R. 571.

<sup>3</sup> *Golaub Koonwuree Bebee v. Eshan Chunder Chowdhoree*, 8 Moo. I. A. 447; S. C. 2 W. R. P. C. 47.

the defendants could not, after the death of the guardian, dispute their liability for the payment of the debt which they had thus deliberately undertaken to pay, notwithstanding that no adjustment of accounts had taken place to ascertain the balance really due before the grant of the *kistbundee*.

Mere delay  
is not a  
ratification.

Mere delay on the part of one, who has recently attained majority, in repudiating an act of his guardian, cannot be treated as a ratification of the act, and is no bar to a suit to set it aside,<sup>1</sup> so long as the delay falls short of the period prescribed by the law of limitation;<sup>2</sup> but it is evidence of ratification, and the silence of the minor may, coupled with other circumstances, justify the Court in raising therefrom the inference that the transaction has been ratified by the minor,<sup>3</sup> as for instance, where a minor having full knowledge of the sale of his property by his guardian, and of the circumstances of such sale, sees the purchaser laying out large sums of money on the land, and raises no objection.<sup>4</sup> Also where a minor has had full knowledge of a

<sup>1</sup> *Kristo Gopaul Ghose v. Nilmoney Debea*, 2 Hay. 164.

<sup>2</sup> *Rajnarain Deb Chowdhry v. Kassee Chunder Chowdhry*, 10 B. L. R. 324. As to the period of limitation, see Act XV of 1877, sec. 7, and 2nd schedule, art. 44, *post*, p. 390.

<sup>3</sup> See *Rajnarain Deb Chowdhry v. Kassee Chunder Chowdhry*, 10 B. L. R. 324; *Boiddonath Dey v. Ramkishore Dey*, 13 W. R. C. R. 166; S. C. 10 B. L. R. note to p. 326; *Doorga Churn Shaha v. Ram Narain Doss*, 13 W. R. C. R. 172; S. C. 10 B. L. R. note to p. 326.

<sup>4</sup> *Doe dem Bhobanny Persaud Ghose v. Teerpoorachurn Mitter*, 2 Morl. Dig. 103; see also *Doe dem Mongooney Dossee v. Gooroo-persaud Bose*, 2 Morl. Dig. 188.

transaction entered into on his behalf by his guardian, and has received the benefit of the consideration money, silence for a length of time would be sufficient to raise a presumption of ratification.

A distinction seems to be drawn<sup>1</sup> between the cases, where the person ratifying is taking upon himself a liability, which has been incurred on his behalf by his guardian during his minority, and the cases where the act done by the guardian is one which his ward ought in fairness to confirm.

In the former cases very much stronger evidence of confirmation is required than in the latter.

Where the person is taking upon himself a liability, it must be proved that there was a clear and distinct ratification, and that when he so adopted the liability he possessed a full knowledge concerning all the facts of the transaction, and was thoroughly acquainted with his right to repudiate the liability and with the protection which the law allows to infancy.<sup>2</sup> No presumption can properly be made against the infant, when he may have neglected to take the initiative in setting aside the act of his guardian.<sup>3</sup>

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<sup>1</sup> See Simpson on the Law of Infants, pp. 65 and 66.

<sup>2</sup> Apparent acquiescence for a short time is not sufficient to amount to a ratification. See *Dharmaji Vaman v. Gurrao Shrinivas*, 10 Bom. H. C. Rep. 311.

<sup>3</sup> *Dagdu v. Kamble*, 2 Bom. H. C. Rep. 381.

Cases  
where  
slight evi-  
dence of  
ratification  
is sufficient.

In the latter class of cases, very slight evidence will be sufficient to show, that there had been a ratification. Any act, which expressly or impliedly recognises the guardian's act as binding, will be taken as confirming it. As for instance, continuance in possession after majority would be held to confirm a lease executed by the guardian. A re-sale of property bought by the guardian for the infant would ratify the original purchase.<sup>1</sup> Acceptance of rent under a lease,<sup>2</sup> or making a mortgage subject to the lease, have similarly been held to amount to confirmation of the lease. Similarly, the appointment of new trustees under a marriage settlement, or the transfer of a fund to the trustees of the settlement, would be *prima facie* evidence of confirmation of the settlement.

Cases  
where  
absence of  
repudiation  
amounts to  
ratification.

In some special cases the absence of an express repudiation amounts to an implied ratification. For instance, where an act had actually been performed by the infant, as where a conveyance passing an estate has been executed by him.<sup>3</sup> Again, a person who has been admitted to the benefits of partner-

<sup>1</sup> *Gooch's case*, L. R., 8 Ch. 266; see Simpson on the Law of Infants, p. 67.

<sup>2</sup> *Ram Chunder Sircar v. Pran Gobind Boishnub*, 25 W. R. C. R. 71; *Ashfield v. Ashfield*, Noy. 92.

<sup>3</sup> *Slator v. Brady*, 14 Ir. C. L. 61; *Doorga Churn Shaha v. Ram Narain Doss*, 13 W. R. C. R. 172; S. C. 10 B. L. R. note to p. 327; *Boidonath Dey v. Rumkishore Dey*, 13 W. R. C. R. 166; S. C. 10 B. L. R. note to p. 326.

ship under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.<sup>1</sup> If he gives such notice, his share in the partnership business is alone liable.<sup>2</sup>

This rule requiring a repudiation within a reasonable time applies to all continuing obligations entered into by the minor, or on his behalf, during his minority ; as for instance, where he has engaged a servant, or an attorney,<sup>3</sup> or has himself entered into a contract of service<sup>4</sup> before attaining majority, and the service continues after he has attained that age; but in these cases he will not without an express ratification be held liable on that part of the obligation which existed only before he attained majority.

The absence of repudiation will merely imply a fresh contract entered into on attaining his majority, and will not render him liable for that part of the service of the servant or attorney which was performed before he was of age,<sup>5</sup> except where the

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<sup>1</sup> Act IX of 1872, sec. 248, *ante*, p. 288.

<sup>2</sup> Act IX of 1872, sec. 247, *ante*, p. 288.

<sup>3</sup> *Thomas v. Waldo*, 1 F. & F. 173; *Guy v. Burgess*, 1 Smith 117.

<sup>4</sup> *Wray v. West*, 15 L. J. N. S. 180. See Act IX of 1850, sec. 1, *ante*, p. 366; and Macnaghten's Precedents of Mahomedan Law, chap. viii, case 6.

<sup>5</sup> Simpson on the Law of Infants, p. 68.

continued employment is such as to amount to an implied undertaking to pay the prior part of the demand incurred during minority.<sup>1</sup>

A person who has once ratified an act of his guardian, done during his minority, cannot afterwards withdraw such ratification, except where it has been obtained from him by fraud or misrepresentation.<sup>2</sup>

Limitation  
of suit to  
set aside  
sale.

If a person wishes to repudiate a sale of his property made by his guardian during his minority, he must do so within three years from the time of his attaining the age of majority.<sup>3</sup>

Effect of  
minority on  
the law of  
limitation  
of suits.

Where a right to sue accrues to an infant during his minority, the provisions of law with respect to the limitation of suits by adults do not apply; but a further time is given to the infant after his attainment of the age of majority. There is no corresponding extension of the time, within which suits against infants can be brought.

The Limitation Act<sup>4</sup> provides as follows:—"If a person entitled to institute a suit or make an application<sup>5</sup> be, at the time from which the period of limita-

<sup>1</sup> *Guy v. Burgess*, 1 Smith 117.

<sup>2</sup> *Saudut Alee Khan v. Khajuh Aleemoollah*, 9 S. D. A. 494; see secs. 5 and 66 of the Indian Contract Act, IX of 1872.

<sup>3</sup> Act XV of 1877, sched. ii, art. 44.

<sup>4</sup> Act XV of 1877, sec. 7.

<sup>5</sup> *Quære*, whether this includes an application for the execution of a decree, see Act X of 1877, sec. 230, and Act XV of 1877, sched. ii, arts. 179 and 180. As to the old law, see *Muthoora Dass v. Shumbhoo Dutt*, 20 W. R. C. R. 53, and cases there cited. See also *Mussamut Annundi Koomar v. Thahoor Panday*, 1 Ind. Jur. N. S. 31; S. C. 4 W. R. M. A. 21.

tion is to be reckoned,<sup>1</sup> a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed."<sup>2</sup> . . . . .

"When his disability continues up to his death, his legal representative<sup>3</sup> may institute the suit, or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed."

When the representative is, at the time of the death, himself under disability, time does not begin to run against him until after his disability has ceased.<sup>4</sup>

Section 7 of Act XV of 1877 further provides that nothing therein shall apply to suits to enforce rights of pre-emption, or shall be deemed to extend for more than three years from the cessation of

When  
representa-  
tive under  
disability.

Suits for  
pre-emption.

Extension  
of period of  
limitation  
how limited.

<sup>1</sup> See *Mussanut Annundi Koomar v. Thakoor Panday*, 1 Ind. Jur. N. S. 31; S. C. 4 W. R. M. A. 21; *Nusheeram Roy v. Shushee Bhooshun Roy*, 5 W. R. C. R. 169; *Taruck Chunder Sen v. Doorga Churn Sen*, 20 W. R. C. R. 2; *Ramcoomar Roy v. Shitul Pershad Roy*, 19 W. R. C. R. 425; *Siddhessur Dutt v. Shamchand Nundun*, 23 W. R. C. R. 285; *Vira Pillay v. Muruga Muttayan*, 2 Mad. H. C. Rep. 340.

<sup>2</sup> *i.e.*, from the time at which limitation begins to run in the case of an adult.

<sup>3</sup> This does not include a purchaser from the minor. *Mahomed Arsad Chowdhry v. Yakoob Ally*, 15 B. L. R. 357; S. C. 24 W. R. C. R. 181.

<sup>4</sup> Act XV of 1877, sec. 7, and illustration (d) to that section.

the disability, or the death of the person affected thereby, the period within which any suit must be instituted or application made.<sup>1</sup>

Applica-  
tions.

There is this important difference between<sup>2</sup> section 7 of the new Limitation Act, and the corresponding section<sup>3</sup> of the Limitation Act,<sup>4</sup> which it repealed, namely, that the exclusion of the period of limitation given by the latter Act to minors applied only to the case of suits instituted, and not to the case of applications made by such minors.

The new Act in extending to applications made by infants the rules of limitation which were formerly applicable only to suits by them, has given no definition of an *application*, but it apparently refers to the applications enumerated in the 3rd division of the 2nd schedule annexed to that Act. If this be so, it will be seen, by looking at that schedule, that a very great alteration has been made in the law by the new Limitation Act.

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<sup>1</sup> In the following cases it was held that the fact of a plaintiff not suing within three years of his obtaining majority, does not in cases where the Act allows a general limitation of twelve years, bar his suit if brought within twelve years of the time when the cause of action accrued:—*Guz Behary Singh v. Mussamut Bebee Washun*, W. R. 1864, C. R. 302; *Bis-sumbhur Sircar v. Soorodhun Dossee*, 3 W. R. C. R. 21; *Hurish Chunder Nag v. Abbas Ali*, 5 W. R. C. R. 204; *Luchmun Singh v. Kazim Ali Khan*, 5 W. R. C. R. 219; *Poorun Singh v. Kasheenath Singh*, 6 W. R. C. R. 20; *Radhamohun Gowee v. Mohesh Chunder Kotwal*, 7 W. R. C. R. 4; *Sree Pershad v. Rajgooroo Treembuknath Deo*, 10 W. R. C. R. 44; *Bahur Ali v. Sookeea Bibee*, 13 W. R. C. R. 63.

<sup>2</sup> Act XV of 1877.

<sup>3</sup> Sec. 7.

<sup>4</sup> Act IX of 1871.



When one of several joint creditors or claimants is a minor, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.<sup>1</sup>

Disability  
of one  
joint credi-  
tor.

When once time has begun to run, no subsequent disability, or inability to sue, stops it.<sup>2</sup>

These provisions extending for infants the period within which suits can be brought, and applications can be made, are of general application, and would have reference to suits and applications for which periods of limitation have been imposed by Acts other than the Limitation Act.<sup>3</sup>

These  
provisions  
are of  
general  
applica-  
tion.

This rule does not however apply to Acts of a special kind, which do not admit of the general provisions of the Limitation Act, as to persons under disability, being annexed to them. For instance, the Privy Council held<sup>4</sup> that the saving clauses of

Except  
with  
regard to  
Acts of a  
special  
kind.

<sup>1</sup> Act XV of 1877, sec. 8.

<sup>2</sup> Act XV of 1877, sec. 9; See *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry*, 7 W. R. C. R. 134.

<sup>3</sup> See *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, 1 I. L. R. C. S. 242; S. C. L. R. 3 I. A. 7, in which the Privy Council held that the period of limitation resulting from the 246th section of Act VIII of 1859 should, in the case of a minor, be modified by the operation of the 11th section of Act XIV of the same year. See also *Hurosoonduree Chowdhrair v. Anundnath Roy Chowdhry*, 3 W. R. C. R. 8.

<sup>4</sup> *Mahomed Bahadur Khan v. The Collector of Bareilly*, 13 B. L. R. 292; S. C. L. R. 1 I. A. 167. See also *Thakoor Kapilnath Sahai Deo v. The Government*, 13 B. L. R. 445; S. C. 22 W. R., C. R., 17.

the general Limitation Act XIV of 1859 could not be imported into Act IX of 1859, which provided for claims to the property of rebels which had been forfeited to the Government, and which<sup>1</sup> barred suits not brought within one year from the date of confiscation.

It has also been held by a Full Bench of the High Court in the case of *Poulson v. Modhoosoodun Paul Chowdhry*<sup>2</sup> that the period of limitation prescribed by Act X of 1859<sup>3</sup> with regard to suits for rent under that Act, are not altered by section 11 of Act XIV of 1859 (allowing a deduction on account of legal disability in computing the period of limitation).<sup>4</sup>

Limita-  
tion not  
affected by  
fact that  
infant has  
competent  
guardian.

An infant does not lose the benefit of these provisions of the Limitation Act, by the fact that during his minority his interests are in the charge of a competent guardian, or under the Court of Wards.<sup>5</sup>

The guardian of an infant can, on behalf of his

<sup>1</sup> Sec. 20.

<sup>2</sup> 2 W. R. Act X R. 21; see also *Dinonath Pandey v. Rughoonath Pandey*, 5 W. R. Act X R. 41.

<sup>3</sup> See secs. 29 and 30 of Act VIII (B. C.) of 1869.

<sup>4</sup> It is, however, doubtful whether the principle of this decision would now apply. See Act XV of 1877, sec. 7, and sched. if, art. 110. Some doubts may also be thrown upon this decision by the decision of the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, 1 I. L. R. C. S. 242; S. C. L. R. 3 I. A. 7.

<sup>5</sup> *Gunga Persaud Nundee v. Ranee Surnomoyee*, 13 S. D. A. Reps. 108; *Mahipatray Chundrarav v. Nensuk Anandray Shet Marvadi*, 4 Bom. H. C. Reps. A. C. J. 199; *Ram Chunder Roy v. Umbica Dossia*, 7 W. R. C. R. 161.

ward, institute a suit or make an application, for which the law gives to the infant an extended period of limitation after the attainment of his majority, at any time during the minority of the infant, even though the period of limitation which would have bound the minor, if he had been an adult, has expired, counting it from the time when the right to institute the suit or make the application accrued to the infant. As the Privy Council pointed out in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*,<sup>1</sup> the opposite construction "is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late, and it cannot be the policy of the law to postpone the trial of claims."

It has been held<sup>2</sup> that the benefits given by Act IX of 1871, section 7, to minors were strictly personal to the minors, and could not be taken advantage of by the purchaser from a person, who was a minor at the time the right to sue accrued. This decision is equally applicable to the provisions of Act XV of 1877.

Benefits  
given to a  
minor by  
Limitation  
Act are  
strictly  
personal.

<sup>1</sup> 1 I. L. R. Calc. Ser. 243; S. C. L. R. 3 I. A. 7. See *Ram Chunder Roy v. Umbica Dossia*, 7 W. R. C. R. 161; *Ram Ghose v. Greedhur Ghose*, 14 W. R. C. R. 429; *S. M. Suffuroonissa Bibee v. Moonshee Noorul Hossein*, 17 W. R. C. R. 419; *Hurro Chunder Bose v. Cassi Nath Roy Chowdhry*, 16 S. D. A. Reps. 19; *Shahzada Woola Gowhur v. Musst. Shah Rukh Begum*, 6 W. R. C. R. 19.

<sup>2</sup> *Mahomed Arsad Chowdhry v. Yahoob Ally*, 15 B. L. R. 357; S. C. 24 W. R. C. R. 181.

Fraud  
stops time  
running.

Where there is fraud, limitation does not run.<sup>1</sup>  
The Limitation Act<sup>2</sup> enacts<sup>3</sup> as follows:—

“ When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application,

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.”

Repudiation by  
minor of  
guardian's  
acts.

Any act which shows an intention on the part of a person, who has attained majority, to avoid his own acts, or those of his guardian on his behalf during his minority, will amount to a repudiation; as for instance, a conveyance of land by him avoids

<sup>1</sup> See *Moulvie Abdool Ali v. Meer Mahomed Mozaffur Hossein Chowdhry*, 5 W. R. C. R. 173.

<sup>2</sup> Act XV of 1877.

<sup>3</sup> Sec. 18.

a conveyance of the same land made by him or by his guardian before he attained the age of majority.<sup>1</sup>

A suit to set aside the acts of himself or of his guardian during his minority is, of course, an express repudiation.

Where a person dies during infancy, or after the attainment of his majority, without having ratified an act either of himself or his guardian, which if ratified would bind his estate, his legal representatives, that is to say, the persons entitled to succeed to his property after his death, can avoid the act ; but no one else can avoid it. As an infant can make no valid disposition of his property either by will<sup>2</sup> or *inter vivos*,<sup>3</sup> the reason for the rule is clear.

The purchaser at an execution sale cannot repudiate encumbrances charged on the estate by an infant owner thereof, or by the guardian of such infant owner.<sup>4</sup> It has been held<sup>5</sup> that where the property of a minor is after his attainment of majority legally conveyed to a purchaser, the minor cannot after such sale ratify charges on such property created during his minority.

The guardian of an infant cannot repudiate his own act, or endeavour to set aside any dealing by

After death of infant, legal representatives may repudiate.

Guardian cannot repudiate his own act.

<sup>1</sup> Simpson on the Law of Infants, p. 73. See Act IX of 1872, secs. 3, 5, & 66, *ante*, p. 383, note 3.

<sup>2</sup> See *post*, Lecture XII.

<sup>3</sup> See *ante*, Lecture VIII.

<sup>4</sup> *Hari Ram v. Jetan Ram*, 3 B. L. R. A. C. J. 427 ; S. C. 12 W. R. C. R. 378.

<sup>5</sup> *Lollah Rawutu Lal v. Chadee Thuthara*, 14 S. D. A. 312.

him with the infant's property on the ground that it was prejudicial to the interests of the infant.<sup>1</sup> The proper course for a friend of the infant to adopt, on finding that the guardian has been improperly dealing with the property, is either to apply to a Civil Court for the removal of the guardian, and the appointment of a new guardian in his place, or to bring a suit on the infant's behalf to set aside the transaction.

A guardian can repudiate a transaction entered by another person, professing to act on behalf of the infant. He might apparently also repudiate the acts of a former guardian of the infant.<sup>2</sup>

Minor  
repudiating  
act must  
restore  
other party  
to position,  
which he  
occupied at  
time of act.

A person who disputes the authority of another to act as his guardian, and repudiates the acts done by such guardian in that capacity,<sup>3</sup> or who repudiates his own acts during his minority,<sup>4</sup> cannot take advantage of those acts so far only as they are beneficial to him.<sup>5</sup>

An infant cannot avoid a contract or other arrangement which has been made by, or for, him during his minority, and has been acted upon by the other

<sup>1</sup> *Monmohinee Joginee v. Jugobundhoa Sadhoka*, 19 W. R. C. R. 233. See Act I of 1872, sec. 115.

<sup>2</sup> *Bolahee Sahoo v. The Court of Wards*, 14 W. R. C. R. 34.

<sup>3</sup> *Soobah Doorga Lal Jha v. Rajah Neelanund Singh*, 7 W. R. C. R. 74.

<sup>4</sup> *Doorga Churn Shaha v. Ramnarain Doss*, 13 W. R. C. R. 172; S. C., 10 B. L. R., note to p. 327.

<sup>5</sup> See cases, *post*, p. 400, note 3.

party thereto, without restoring that party to the position which he occupied at the time of the arrangement being made, at least, if that arrangement was free from fraud or gross negligence on the part of that party.

If a minor on coming of age disavows a sale made by his guardian to clear his estate from debt, he is only entitled to get back the property in the position in which it would have been had no sale taken place; that is to say, with the incumbrances which the sale was intended to remove;<sup>1</sup> and in the case of any sale of a minor's property, where the purchaser has acted *bonâ fide*, and has paid a fair price for the property, and the purchase-money has been applied in any way to the minor's benefit, the minor is not entitled to a decree for immediate possession without also refunding the purchase-money with interest, a set-off being allowed to him for net rents and profits for the time the property was in the possession of the purchaser.<sup>2</sup> The minor must

<sup>1</sup> *Musst. Buhshun v. Musst. Malalai Kooeri*, 3 B. L. R. A. C. 423 ; *S. C. Musst. Buhshun v. Musst. Doolhin*, 12 W. R. C. R. 337 ; *Hamir Singh v. Musst. Zakia*, 1 I. L. R., All. Ser. 57.

<sup>2</sup> *Muthoora Doss v. Kanoo Beharee Singh*, 21 W. R. C. R. 287 ; *Baihesar v. Bai Ganga*, 8 Bom. H. C. Reps. 31. Sec. 64 of the Indian Contract Act, IX of 1872, provides as follows : "When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received." See also section 65 of the same Act.

also repay to the purchaser any money which he may have laid out in improvements.<sup>1</sup>

The plea of minority can be used only for the protection of the minor, and must not be used for the purpose of injuring persons who have acted *bonâ fide*.<sup>2</sup> In one case,<sup>3</sup> where the plaintiff on coming of age sued to set aside a sale of his ancestral property which had been made by his guardian during minority, no legal necessity being proved, but it appearing that he had had the benefit of the sale proceeds, and that at the date of the transaction he was old enough to understand its nature, a decree was passed in his favour, but subject to the condition that he should first refund the proceeds of sale.

Where the Court sets aside a sale made by a minor, or by his guardian on his behalf, it will require the purchaser to account to the minor for the mesne profits of the estate while it has been in his possession.<sup>4</sup>

<sup>1</sup> *Morgan v. Abdool Hye*, 23 W. R. C. R. 393.

<sup>2</sup> *Paran Chunder Pal v. Karunamayi Dasi*, 7 B. L. R. 90; S. C. 15 W. R. C. R. 268.

<sup>3</sup> *Paran Chunder Pal v. Karunamayi Dasi*, 7 B. L. R. 90; S. C. 15 W. R. C. R. 268; see also *Musst. Shooghury Koer v. Boshisht Narain Singh*, 8 W. R. C. R. 331; *Baikesar v. Bai Ganga*, 8 Bom. H. C. Rep. A. C. J. 31; *Shurrut Chunder v. Rajkissen Mookerjee* 15 B. L. R. 350; S. C. *Surut Chunder Chatterjee v. Ashutosh Chatterjee*, 24 W. R. C. R. 46.

<sup>4</sup> *Shurrut Chunder Dey Sircar v. Jadub Narain Nundee*, 1 W. R. C. R. 90; *Luchman Singh v. Must. Bibee Miriam*, 5 W. R. C. R. 290; *Gour Pershad Narain v. Sheo Pershad Ram*, 5 W. R. C. R. 103; *Futtehoonissa Begum v. Dyal Tewaree*, 2 Sev. 301.



There is another class of cases connected with this subject, namely, where a person repudiating a contract made during his infancy endeavours to recover money paid under that contract. The English rule of law with respect to these cases is, that where the consideration, on account of which the money was paid, has totally failed, the minor can recover back his money;<sup>1</sup> but that, where there has been a performance of any part of the consideration, he cannot recover back any portion of the money advanced by him.<sup>2</sup> He must either accept and continue the contract, or repudiate it and lose his money.

Though a person who has *bonâ fide* contracted with the guardian of a minor may not be able to make his contract binding against the estate of the minor, he may sometimes have a remedy against the guardian, who has contracted with him without authority.<sup>3</sup>

Guardian,  
when personally liable to person with whom he has contracted on behalf of minor.

Where the purchaser has not been deceived, he has no remedy.<sup>4</sup>

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<sup>1</sup> *Corpe v. Overton*, 10 Bing. 252; see Simpson on the Law of Infants, p. 74.

<sup>2</sup> Simpson on the Law of Infants, p. 73; *Holmes v. Blogg*, 8 Taunt., 508; *Ex-parte Taylor*, 8 D. M. and G. 254; Dart's V. and P., 5th edn., pp. 26-27.

<sup>3</sup> *Moulvie Syud Ashruff Ali v. Mirza Quasim*, 3 Sel. Reps. 49.

<sup>4</sup> See *Doorga Churn Bhattacharjee v. Shosheebhosun Mitter*, 5 W. R. S. C. C. Rep. 23. See *Sheikh Azeemooddeen Ahmed v. Moonshee Athur Ali*, 5 W. R. C R. 136.

In one case<sup>1</sup> the Privy Council held that it is not for the public benefit, that, where two parties deal with the sale and purchase of the property of infants, knowing that they have not by law the power so to deal with it, and that such transaction is calculated to injure those infants, one of the parties should be able, where the infant on obtaining majority has set aside the sale, to sue the other party for damages. In that case the Privy Council even refused to give costs to either party, considering them both to be in *pari delicto*.

Where, however, the fraud has been on the part of the guardian alone, and the purchaser has been acting *bonâ fide*, there seems to be no doubt that he could recover from the guardian all that the infant had required him to give up.

In the case of *Futteh Narain v. Deen Dyal Lall*,<sup>2</sup> the managing member of a joint family took a loan under a bond, pledging his own share of the estate and the shares of his minor brother and cousin, and covenanting that a portion of the interest should be credited to the rent of the hypothecated share held by the lender under a farming lease. In a suit by the managing member and the minors for arrears of farm rent, the lender

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<sup>1</sup> *Bhoopmarain Chowbey v. Rughoonath Gobind Roy*, 18 W. R. C. R. 230.

<sup>2</sup> 15 W. R. C. R. 37; see also *Nawab Syud Ashrufooddeen Alee Khan v. Musst. Shamasoonderee Dossee*, 9 S. D. A. 531.

claimed a set-off. The Revenue Court found the bond proved against the managing member, and allowed the set-off as against him, but decreed the rent, as far as it involved the interests of the minors, on proof of their non-liability by the absence of necessity for the loan. The lender of the money then sued the managing member to recover the rent paid on account of the share of the minors, as if the bond had been executed by him alone; and a Division Bench<sup>1</sup> of the High Court held that such suit was rightly brought.

In an old case<sup>2</sup> a guardian was held to be responsible for all claims arising out of transactions during his management, and that to him, therefore, must claimants look for the satisfaction of their demands, and not to the minor whose estate he manages, but that the estate of the minor is responsible for all just debts incurred on account of such minor; and that his guardian, having rendered full and fair accounts, would be entitled to recover from the estate any sums that might appear to have been borrowed from necessity, and for the evident benefit of the minor.

It is doubtful, however, whether the principle of

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<sup>1</sup> L. S. Jackson and Ainslie, JJ.

<sup>2</sup> *Anon.*, 1 Morl. Dig. 276; see also *Jowahir Singh v. Chundernarrain Rai*, 3 Sel. Reps. 83, and *Neek Singh v. Anoopun Das*, 2 Sel. Reps. 154.

that decision would now be carried out in its entirety.<sup>1</sup>

When a guardian professes to act on behalf of an infant, he does not, in the absence of an express contract, make himself a surety in cases where the infant's estate is not bound. A person who deals with the guardian of an infant must, as we have seen,<sup>2</sup> be on his guard, and make every possible enquiry with reference to the authority of the person with whom he deals, and must satisfy himself, as well as he can, that the particular transaction is one binding on the ward. Where he does so, he can maintain the transaction as against the ward. Where he does not do so, he is surely prevented by his own laches from recovering damages from the guardian.<sup>3</sup>

A guardian cannot be sued for specific performance of a contract of marriage entered into by him on behalf of his ward.<sup>4</sup> He may, however, be liable to a suit for damages for a breach of such contract, at any rate, when he has been guilty

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<sup>1</sup> See *Sheikh Azeemooddeen Ahmed v. Moonshee Athur Ali*, 3 W. R. C. R. 137.

<sup>2</sup> *Ante*, p. 347.

<sup>3</sup> See *Doorgachurn Bhuttacharjee v. Shoshee Bhoosun Mitter*, 5 W. R. S. C. C. Ref. 23.

<sup>4</sup> *In the matter of Gunput Narain Singh*, 1 I. L. R. Calc. Ser. 75

of fraud or misrepresentation in inducing the other party to enter into such contract.<sup>1</sup>

An infant can either during his minority (by a next friend), or after he has attained his majority, sue his guardian for damages for the waste, malversation, or maladministration of his estate,<sup>2</sup> or for gross negligence in the management thereof,<sup>3</sup> or in the conduct of suits brought on behalf of or against the infant.<sup>4</sup> He can also at any time require the guardian or manager of his estate to give an account of his dealings with the property subject to his charge.<sup>5</sup>

Liability  
for guar-  
dian for  
waste, &c.

and to ac-  
count.

<sup>1</sup> *Asgar Ali Chowdhry v. Mahabat Ali*, 13 B. L. R. App. 34; *Jogeswar Chakrabati v. Pauch Kauri Chakrabati*, 5 B. L. R. 395.

<sup>2</sup> *S. M. Lakhi Prya Dasi v. Nobin Chandra Nag*, 3 B. L. R. A. C. 37; S. C. 11 W. R. C. R. 370; *Alimelammal v. Arunachellam Pillai*, 3 Mad. H. C. Reps. 69; *Baboo Ujoodhya Persaud Narain Singh v. The Collector of Sarun*, 7 S. D. A. 370; *Taruck Chunder Sen v. Doorga Churn Sen*, 20 W. R. C. R. 2; Simpson on Infants, chap. xxvii.

<sup>3</sup> *Baboo Gopeenath v. Ramjeeun Lall*, 15 S. D. A. 913; *Baboo Udjoodyapersaud Narain Singh v. The Collector of Sarun*, 7 S. D. A. 370.

<sup>4</sup> *Issur Chunder Rai v. Ragub Indernarain*, 16 S. D. A. 349; S. C. on review at page 611. As to the rights of an infant against his guardian, who, by not commencing a suit, has allowed a claim of the infant to be barred by limitation; see *Taruck Chunder Sen v. Doorga Churn Sen*, 20 W. R. C. R. 2. There is some doubt, however, whether a guardian can be so sued, as it is in the power of any friend of the infant to institute a suit on his behalf (see *post*, Lecture XII.)

<sup>5</sup> See *ante*, p. 329; *Cary v. Bertie*, 2 Vern. 342, 2 P. W. 119. The guardian would, in cases where he has acted properly, be entitled to his costs of a suit for an account, and the next friend of an infant suing his guardian for an account may be made personally liable for the costs of such suit, when it appears, that the charges of mismanagement, on which it is based, are unfounded (see Act X of 1877, sec. 440).

Liability  
of guardian  
to the cri-  
minal law.

A guardian is liable to be punished by the criminal law for criminal breach of trust,<sup>1</sup> or for cheating.<sup>2</sup>

His lia-  
bility on  
a contract  
of appren-  
ticeship.

Where a guardian enters into an agreement of apprenticeship<sup>3</sup> on behalf of his ward, and covenants with the master with respect to the service or behaviour of the ward, he is liable to be sued on such agreement, when the ward absents himself or neglects to perform his work.<sup>4</sup>

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<sup>1</sup> Act XLV of 1860, sec. 405. "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust.'"

<sup>2</sup> Act XLV of 1860, sec. 418.

<sup>3</sup> See Act XIX of 1850, *ante*, Lecture X.

<sup>4</sup> For form of plaint in such suit, see Act X of 1877, 4th schedule, No. 64.

## LECTURE XII.

### SOME INCIDENTS OF THE STATUS OF INFANCY.

WE have considered in previous lectures the capacity of infants to contract, their liability to the criminal law and to suits in tort or with reference to their estates, and also the duties, powers, and liabilities of their guardians during their minority.

We now come to consider some other provisions of the law with respect to their capacities and incapacities.

By the Succession Act,<sup>1</sup> the domicile of a minor Domicile of minor. follows the domicile of the parent from whom he derived his domicile of origin.<sup>2</sup>

The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business.<sup>3</sup>

By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.<sup>4</sup>

The wife's domicile during the marriage follows

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<sup>1</sup> X of 1865, sec. 14.

<sup>2</sup> This is in accordance with the English law. The domicile of an illegitimate child apparently follows the domicile of the mother. See Stokes' edition of the Indian Succession Act, p. 11; *Pottinger v. Wightman*, 3 Mer. 67; 1 Jayman on Wills, 3rd edn., p. 11.

<sup>3</sup> Act X of 1865, sec. 14.

<sup>4</sup> Act X of 1865, sec. 15.

the domicile of her husband, except they be separated by the sentence of a competent Court, or the husband be undergoing a sentence of transportation.<sup>1</sup>

Except as above, a person cannot, during minority, acquire a new domicile.<sup>2</sup>

Infant may  
be a wit-  
ness.

An infant, when of sufficient understanding, is competent to give evidence in a Court of Justice.

The Indian Evidence Act<sup>3</sup> provides that "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

This is in accordance with the English law which regulates the competency of children to give evidence by the degree of understanding which they appear to possess, and not by their age.<sup>4</sup>

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<sup>1</sup> Act X of 1865, sec. 16.

<sup>2</sup> Act X of 1865, sec. 17.

<sup>3</sup> I of 1872, sec. 118.

<sup>4</sup> Macpherson on Infants, p. 452. Under the Mahomedan law minors are incompetent to give evidence.—Macnaghten's Principles of Mahomedan Law, chap. xii, princ. 10. The Hindu law only permits minors to be witnesses on failure of witnesses duly qualified, or in cases of adultery, theft, affray, and "criminal business."—Stokes' Hindu Law books, p. 35. Under Act II of 1855 (sec. 14), which was repealed by Act I of 1872, children under seven years of age, who appeared incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly, were incompetent to testify; but all children over seven years of age were, irrespective of their understanding, competent to testify.



When a child is tendered as a witness in a Court of Justice, it is the duty of the Judge, before allowing the oath or solemn affirmation to be administered, to examine the child as to his mental capacity and understanding with special reference to his capacity to distinguish between good and evil, and to his possession of sufficient knowledge of the nature and consequences of an oath, and of the penalties attaching to the infraction thereof. In cases of trial by jury, this question is not one for the jury, but for the Judge alone, although, where the Judge has allowed the infant to be sworn or affirmed, and the infant has given its testimony, the jury may, in weighing that testimony, take into consideration the youth or incapacity of the witness.<sup>1</sup>

Duty of  
Judge,  
when child  
tendered as  
witness.

Mr. Phillips, in his work on the Law of Evidence,<sup>2</sup> Evidence of children.  
says : " With regard to the weight and effect of the testimony of children Sir W. Blackstone observes,<sup>3</sup> that where the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion. In many cases undoubtedly, the statements of children

<sup>1</sup> *Queen v. Hosseinee*, 8 W. R. Crim. R. 60.

<sup>2</sup> 10th edn., p. 11.

<sup>3</sup> Commentaries, vol. iv., 214.

are to be received with great caution. But it is clear a prisoner may be legally convicted upon such evidence alone, and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.

“It may be observed, the preliminary enquiry usually made for ascertaining their competency, is not always of the most satisfactory nature; and sometimes is of such a description, that merely by a slight practising of the memory, a child might thus be made to appear competent, and qualified as a witness. The enquiry is commonly confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment for perjury. It has been held, however, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial.<sup>1</sup> Independently of the

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<sup>1</sup> *R. v. Williams*, 7 C. & P. 320.

sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive."

The evidence of an infant cannot be taken unless he is sworn or affirmed;<sup>1</sup> and where the child is unfit to be sworn it follows as a necessary consequence that any account which it may have given to others of the transaction ought not to be admitted.<sup>2</sup> Statements  
of infants.

Statements made by an infant in cases coming under section 32 of the Indian Evidence Act<sup>3</sup> would apparently only be admissible after evidence of the intelligence of the infant.

But where the conduct of an infant in reference to any fact in issue in, or relevant to, any suit or proceeding or the conduct of infant, an offence against whom is the subject of any proceeding, is relevant, it seems that the infant's statement would be evidence; as for instance where a female infant has been ravished, and has made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made would be relevant.<sup>4</sup>

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<sup>1</sup> See Act X of 1873, sec. 5; *Queen v. Anunto Chuckerbutty*, 22 W. R. Crim. R. 1; *Queen v. Musst. Itwarya*, 22 W. R. Crim. R. 14.

<sup>2</sup> Macpherson on Infants, p. 453.

<sup>3</sup> I of 1872.

<sup>4</sup> Illustration (j) to sec. 8 of Act I of 1872.

Infant  
cannot  
institute  
suit,

An infant cannot himself institute any suit,<sup>1</sup> except a suit in the Presidency Small Cause Court for a sum of money not greater than five hundred rupees, which may be due to him for wages or piece-work, or for work as a servant.<sup>2</sup>

or defend  
suit, or  
make ap-  
plication.

An infant cannot himself defend a suit<sup>3</sup> or make any application to a Civil Court.

Suits on  
behalf of  
a minor.

Every suit on behalf of a minor must be instituted in his name by an adult person, who in such suit is called the next friend of the minor.<sup>4</sup>

Who may  
be next  
friend.

Any person<sup>5</sup> being of sound mind and of full age may act as next friend of a minor, provided his interest is not adverse to that of such minor and he is not a defendant in the suit.<sup>6</sup>

Pauper  
next friend

The Civil Procedure Code<sup>7</sup> by making the next friend liable for costs<sup>8</sup> apparently contemplates his not being a pauper. Though as a general rule the Court should not allow a suit to be brought on behalf of an infant by a next friend who is a pauper,

<sup>1</sup> Act X of 1877, sec. 440. See *Cheyti Narain Singh v. Bunwaree Singh*, 23 W. R. C. R. 395.

<sup>2</sup> Act IX of 1850, sec. 31.

<sup>3</sup> In a case (*Luchimonee Dassee v. Kettermoney Dassee*) cited in Broughton's Civil Procedure, 4th edn., p. 92, Mr. Justice Norman required the summons to be served upon an infant defendant personally. As to the service of summons in suits against wards of the Court of Wards, see *ante*, p. 126.

<sup>4</sup> Act X of 1877, sec. 440.

<sup>5</sup> See *Musst. Dullabh De v. Manu Bibi*, 5 Sel. Rep. 50; *Obhoy Churn Mookerjee v. Panchanun Bose*, 15 S. D. A. 1462.

<sup>6</sup> Act X of 1877, sec. 445.

<sup>7</sup> Act X of 1877.

<sup>8</sup> Sec. 440.

under special circumstances the Court may allow such suit to be brought by a next friend who is a pauper,<sup>1</sup> as for instance, where the infant cannot procure a solvent next friend.

When at the time of presentation of a complaint on behalf of a minor it appears to the Court that the interest of the next friend in any way conflicts with, or is likely to conflict with, the interest of the minor, the Court should refuse to admit the complaint.<sup>2</sup>

Interest of  
next friend  
conflicting  
with that  
of infant.

In one case,<sup>3</sup> where, in a suit on a mortgage against a father and his daughter, who was his ward, the father in his answer alleged that he himself was alone personally liable, and the Court of first instance also held to the same effect, it was held by the High Court that he ought not to be allowed to appeal from that decision ostensibly on behalf of his ward, but in reality for the purpose of protecting himself against the decree by making the property of his ward liable under the decree, in ease of himself. The Privy Council confirmed this judgment, and held that the vice of the compromise on which

<sup>1</sup> See *S. M. Golaupmonee Dassee v. S. M. Prosonomoyee Dossee*, 11 B. L. R. 373. See also *Musst. Afzul Sultan*, S. D. A., Summary cases, 78; *Lindsay v. Tyrrell*, 2 D. G. and J.; S. C., 3 Jur. N. S. 1014; and *Raj Rajindro Misser v. Bissonath Muttyloil*, Fult. 490.

<sup>2</sup> As to the procedure when the fact of the interest of the next friend being adverse to the interest of the minor comes to the knowledge of the Court after the institution of the suit, see *post*, p. 415.

<sup>3</sup> *Unmoda Dabee v. M. L. Stevenson*, 22. W. R. C. R. 291; *H. G. French v. Baranashee Banerjee*, 8. W. R. C. R. 29, *ante* p. 315.

the High Court's judgment had been based was that it was made without the party, who was principally affected by it, *viz.*, the ward, being sufficiently represented.

To take another instance of the jealousy with which the Court regards any conflict of interest between a minor and a person, acting on his behalf and bound to protect his interests. By an order of the Supreme Court of Madras, it was ordered that when the property of infants is unprotected, the Registrar should, with the previous consent of the Court, institute proceedings on behalf of the infant for the purpose of protecting him and his property. It was held by the Privy Council<sup>1</sup> that the order was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest.

Course  
when plaint  
filed with-  
out next  
friend.

If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader<sup>2</sup> or other person by whom it was presented. Notice of such application must be given to such person by the defendant, and the Court, after hearing his objections,

<sup>1</sup> *H. A. Kerahoose v. W. A. Serle*, 3. Moo. I. A., 329.

<sup>2</sup> "Pleader" means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of the High Court. Act X of 1877, sec. 2.

if any, may make such order in the matter as it thinks fit.<sup>1</sup>

If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor,<sup>2</sup> or by a defendant, for his removal; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

Unless otherwise ordered by the Court, a next friend cannot retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.<sup>3</sup>

The application for the appointment of a new next friend must be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.<sup>4</sup>

On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.<sup>5</sup>

<sup>1</sup> Act X of 1877, sec. 442.

<sup>2</sup> By a next friend for the purposes of the application.

<sup>3</sup> Act X of 1877, sec. 447.

<sup>4</sup> *Ibid.*

<sup>5</sup> Act X of 1877, sec. 448.

If the pleader<sup>1</sup> of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.<sup>2</sup>

Liability of  
next friend  
for costs.

The Civil Procedure Code provides<sup>3</sup> that the next friend of a minor in a suit may be ordered to pay any costs in the suit, as if he were plaintiff.

The next friend of an infant plaintiff is, in the absence of an order of the Court with reference to payment out of the minor's estate, or otherwise, liable in the first instance for costs which are ordered to be paid to a defendant in the suit,<sup>4</sup> and he is also liable to be sued for costs by his own attorney or pleader,<sup>5</sup> as the contract with the attorney or pleader is entered into by him and the minor is not liable thereon.<sup>6</sup>

If the suit has been properly brought, and properly conducted, the next friend can recover from the estate of the infant the costs which he has been

<sup>1</sup> See *ante*, p. 414, note 2.

<sup>2</sup> Act X of 1877, sec. 449.

<sup>3</sup> Act X of 1877, sec. 440.

<sup>4</sup> *Stephen v. Hume*, Morton 281; *Omrao Singh v. Prem Narain Singh*, 24 W. R. C. R. 264; *Newton v. London, Brighton, and South Coast Railway Company*, 7 Dowl. and L. 333.

<sup>5</sup> *Hawkes v. Cottrell*, 3 H. & N. 243; see *Radhanath Bose v. Suttoprosono Ghose*, 2 Ind. Jur. N. S. 269.

<sup>6</sup> *Radhanath Bose v. Suttoprosono Ghose*, 2 Ind. Jur. N. S. 269; *Joynarain Bose v. Mohesh Chunder Moonshee*, 14 S. D. A. 1215.



compelled to pay to a defendant,<sup>1</sup> and also such costs, charges, and expenses as have been properly incurred in conducting the suit on behalf of the infant.<sup>2</sup>

Where, however, the suit is unnecessary or improper, or it has been improperly conducted, the next friend may be made personally liable for the costs, and not be permitted to recover the same from the estate of the infant.<sup>3</sup> It was held in *Whittaker v. Marlar*,<sup>4</sup> that nothing short of a dishonest intention will be sufficient to render a next friend liable personally for the costs, and that no degree of mistake or misapprehension will be sufficient.

A solicitor acting on behalf of an infant has a lien for his costs on sums recovered in the suit.<sup>5</sup>

Where the defendant to a suit is a minor, the Court on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.<sup>6</sup>

Appoint-  
ment of  
guardian  
for the suit  
when  
defendant  
is a minor.

<sup>1</sup> *Whittaker v. Marlar*, 1 Cox 285; *Taner v. Ivie*, 2 Ves. Sen. 466; see Act IX of 1872, sec. 68, *ante*, p. 279.

<sup>2</sup> *Fearn v. Young*, 10 Ves. 184.

<sup>3</sup> *Pearce v. Pearce*, 9 Ves. 548, and cases cited in Simpson on Infants, p. 450, note (II); *Chowdhry Chutturals Singh v. The Government*, 3 W. R. C. R. 57; *Rajah Bikromajeet M. O. Deb v. The Court of Wards*, 21 W. R. C. R. 312.

<sup>4</sup> 1 Cox. 285; *Luchmun Pershad v. Juggurnath Doss*, W. R. 1864 M. R. 17.

<sup>5</sup> *Pritchard v. Roberts*, L. R. 17 Eq. 222.

<sup>6</sup> Act X of 1877, sec. 443; *Gobind Dass v. Joyhissen Dass*, 2 Agra, H. C. Rep. 101.

An order for the appointment of a guardian for the suit may be obtained upon application in the name of the minor. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor,<sup>1</sup> and that he is a fit person to be so appointed.<sup>2</sup>

Who may  
be appoint-  
ed.

A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor ; but neither a plaintiff nor a married woman can be so appointed.<sup>3</sup>

In a suit in the High Court the guardian for the suit should enter appearance for the infant. He need not fill a written statement, but he may do so.<sup>4</sup>

If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him and may order him to pay such costs as may have been occasioned to any party by his breach of duty.<sup>5</sup>

Death of  
guardian  
for the suit.

If the guardian for the suit dies pending such suit or is removed by the Court, the Court shall appoint a new guardian in his place.<sup>6</sup>

<sup>1</sup> See *ante*, p. 413.

<sup>2</sup> Act X of 1877, sec. 456. The mother of the infant may be appointed guardian for the suit. See *In the matter of the Petition of Danappa bin Subrav*, 1 Bom. H. C. Rep. 2nd edn. A. C. J. 134.

<sup>3</sup> Act X of 1857, sec. 457.

<sup>4</sup> Rules of 9th February 1875, rules 38 and 59.

<sup>5</sup> Act X of 1877, sec. 458.

<sup>6</sup> Act X of 1877, sec. 459.

When the enforcement of a decree is applied for against the heir or representative, being a minor, of a deceased party, a guardian for the suit of such minor shall be appointed by the Court, and the decree-holder shall serve on such guardian notice of such application.<sup>1</sup>

Enforcement of decree against minor representative of judgment-debtor.

The Civil Procedure Code<sup>2</sup> does not apparently contemplate the guardian for the suit of a minor becoming personally liable for the costs of other parties to the suit.

Liability of guardian for the suit.

Apart from any misconduct on his part, a guardian for the suit cannot apparently be made liable for any of such costs, or for anything which may be decreed against the infant in the suit.<sup>3</sup> He is, however, liable, in the first instance, for the costs of the attorney employed by him ;<sup>4</sup> but he may afterwards recover the same from the infant's estate.<sup>5</sup>

In a suit against a minor, if the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order. Where the guardian is simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the

<sup>1</sup> Act X of 1877, sec. 460.

<sup>2</sup> Act X of 1877.

<sup>3</sup> *Sherafutoolah Chowdhry v. S. M. Abedoonissa Bibee*, 17 W. R. C. R. 374; *Morgan v. Morgan*, 11 Jur. N. S. 233; see, however, *Macpherson on Infants*, p. 397.

<sup>4</sup> *Radhanath Bhose v. Suttoprosono Ghose*, 2 Ind. Jur. N. S. 209.

<sup>5</sup> See *ante*, p. 416.

representative of the minor, and representing his estate.<sup>1</sup>

Liability  
of infant in  
suit.

The person of an infant party to a suit can be taken in execution<sup>2</sup> and his property is liable to be attached.

Costs of  
guardian  
for the suit.

Where the conduct of the guardian for the suit has been proper, even though his defence may have been unsuccessful,<sup>3</sup> he is entitled to his costs. Where, as in the case of an administration suit, there is property belonging to the infant with which the Court can deal, the costs may be paid thereout. In other cases the guardian must recover the costs, as necessaries, out of the infant's estate.<sup>4</sup>

Leave of  
Court  
necessary  
before  
receiving  
money.

No sum of money or other thing can be received or taken by a next friend or guardian for the suit at any time on behalf of a minor, at any time before decree or order, unless he has first obtained the leave of the Court, and given security to its satisfaction that such money or other thing shall be duly accounted for, and held for the benefit of such minor.<sup>5</sup>

Applica-  
tion to  
Civil Court  
by minor.

Every application to the Court on behalf of a minor must be made by his next friend, or his guar-

<sup>1</sup> *Komul Chunder Sen v. Surbessur Dass Goopto*, 21 W. R. C. R. 298; *Brojomohun Mojomondar v. Upendronath Surmah Mojomondar*, 15 W. R. C. R. 192.

<sup>2</sup> *Sherafutoolah Chowdhry v. S. M. Abedoonissa Ribee*, 17 W. R. C. R. 374; *Collins v. Brook*, 5 H. & N. 708; *Finley v. Jowle*, 13 East, 6.

<sup>3</sup> *Morgan v. Morgan*, 11 Jur., N. S. 233.

<sup>4</sup> See *ante*, p. 279.

<sup>5</sup> Act X. of 1877, sec. 461.

dian for the suit,<sup>1</sup> except where the application seeks the removal of the next friend or guardian, or the appointment of a new next friend or guardian, or is in any way against the next friend or guardian, in which case the application should be made by the attorney or pleader for the infant in the name of some one, as next friend for the purpose of the application.<sup>2</sup>

Every application made to the Court otherwise than in a suit must be made by a next friend for the purpose of the application, and no order can be made upon an application to which an infant is respondent, unless a guardian for the suit be appointed to protect the interest of such infant.

Every order made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party, at whose instance such order was obtained, knew or might reasonably have known the fact of such minority, with costs to be paid by such pleader.<sup>3</sup>

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<sup>1</sup> Act X of 1877, sec. 441. Notices of applications to be made in suits should be served on the next friend or guardian for the suits.

<sup>2</sup> *Cox v. Wright*, 9 Jur. N. S. 981.

<sup>3</sup> Act X of 1877, sec. 464. It has been held in England that where a suit, brought against an infant, who did not appear by guardian, but appeared by an attorney, had been dismissed, the plaintiff cannot set aside such judgment on the ground that infant was not properly

These provisions of the Code of Civil Procedure with respect to suits by and against minors do not apply to any minor for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.<sup>1</sup>

Unless properly represented, decree does not bind infant.

Unless an infant is properly represented in a suit or other judicial proceedings by a next friend or guardian, as the case may be, neither the decree nor any order on any of the proceedings therein, will bind him or his estate.<sup>2</sup>

Duty of Court when minor unrepresented.

Whenever a suit is brought by or against a person who is either proved to be, or from his appearance clearly is, a minor, it is the duty of the Court to see that he is properly represented in such

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represented—*Bird v. Pegg*, 5 Barn. and Ald. 418. On the authority of this case the High Court in *Mahomed Hatun v. Mussamut Jumeera Bibee*, 6 W. R. C. R. 183, held that there is no reason why a judgment obtained in any suit by an infant should not be enforceable in his favour.

<sup>1</sup> As to suits by and against wards of the Court of Wards, see *ante*, p. 125. As to suits by and against minor subject to the jurisdiction of the Civil Courts in the Mofussil, see *ante*, p. 150. It is not very clear what the expression "local law" in sec. 464 means. It is just possible that the expression "local law" might include the Charter of the Court.

*Quare*.—Whether this provision renders unnecessary the appointment of a guardian *ad litem* in a suit in Calcutta where a manager of the estate of the defendant has been appointed under Act XL of 1858. Apparently not; see sec. 29 of that Act.

<sup>2</sup> *Radha Kristo Surma v. Ram Chunder Doss*, 11 W. R. C. R. 300; *Bamasoonduree Debee v. Grish Chunder Banerjee*, 3 W. R. Act X R. 138; S. C. on review, 4 W. R. C. R. 106; *Nubokant Doss v. Syud Abdool Juleel*, 20 W. R. C. R. 372.

suit,<sup>1</sup> and when the Court finds that a party to a suit is a minor, and is not properly represented, it should either strike the minor's name out of the suit,<sup>2</sup> or should stay the proceedings until such time as he can be properly represented by a next friend or guardian for the suit as the case may be.<sup>3</sup>

The Court would, however, have power to dismiss the suit on that ground,<sup>4</sup> but it could not give any costs against the infant or his estate, and the dismissal of the suit will not prevent a fresh suit on the same cause of action.

The law does not recognize any act of a minor when not having a guardian before the Court,<sup>5</sup> and the Court should not take any proceedings at the instance of the minor himself, or allow any intervention on the part of the minor.<sup>6</sup>

It is the bounden duty of the Court to look after the interests of the minor. It should see that the case is strictly proved against the minor and should not allow a decree by consent against an infant

Duty of Court to look after interests of minor.

<sup>1</sup> *Moorlee Dhur v. Nathonee Mahtoon*, 25 W. R. C. R. 184.

<sup>2</sup> *Radhakristo Surma v. Ramchunder Doss*, 11 W. R. C. R. 300;

*Dhoondh Bahadoor v. Priag Singh*, 17 W. R. C. R. 314.

<sup>3</sup> *Rollo v. Smith*, 1 B. L. R. O. C. 10; *Flight v. Bolland*, 4 Russ. 298; *Bamasoonduree Dabee v. Grish Chunder Banerjee*, 4 W. R. C. R. 106; *Mahomed Hatum v. Mussamut Jumeera Bibee*, 6 W. R. C. R. 183.

<sup>4</sup> *G. Chinniah v. Baubun Saib*, 5 Mad. H. C. R., p. 535; *Gobind Dass v. Joykissen Dass*, 2 Agra H. C. Rep. 101.

<sup>5</sup> *Bamasoonduree Dabee v. Grish Chunder Banerjee*, 3 W. R., Act X. R. 138.

<sup>6</sup> *Radhakristo Surma v. Ramchunder Doss*, 11 W. R. C. R. 300.

without ascertaining that it is for the benefit of the infant that such a decree should be made.<sup>1</sup>

The Court should not permit a minor to be joined as co-plaintiff in a suit with persons whose interests are adverse to his. When the Court finds that a suit has been so brought, it should require the minor to be made a defendant, and should appoint a guardian for the suit to protect his interests.<sup>2</sup>

The rule requiring the Court to protect the interests of the infant, even though he be properly represented, applies to all proceedings in the suit, and the Court should especially prevent an improper sale of the infant's property. In the case of *Shaikh Abdool Kurreem v. Syud Jaun Ali*,<sup>3</sup> Sir Richard Couch, C.J., observed :—"It seems to us that the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of a decree. These are cases in which the proceedings ought to be carefully watched, and care ought to be taken that the property of minors is not disposed of except with proper precautions, and it is distinctly made to appear that the property of the minor is about to be sold." Unless it be so described, the sale will not pass the interest of the minor to the purchaser.

As far as possible, it is the duty of the Court to

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<sup>1</sup> *Romchurn Raha Bukshee v. Mungul Sircar*, 16 W. R. C. R. 233.

<sup>2</sup> *Krishnabai Koru Depa Vaja v. Sonubai*, 2 Bom. H. C. Rep. 327.

<sup>3</sup> 18 W. R. C. R. 56.



prevent the minor being injured by the fraud, laches or negligence of his guardian, and where an appeal has been struck off in consequence of the neglect or inability of the guardian to prosecute it, the Appellate Court may restore the appeal.<sup>1</sup>

A suit by an infant should be intituled "A. B., Title of suit by or against an infant, a minor, by C. D., his next friend, v. E. F." In a suit against an infant, the infant should be described therein as defendant, and after a guardian for the suit has been appointed to watch his interests, the title of the suit should be A. B. v. C. D. by E. F. his guardian for the suit.

It is, however, very much the practice in this country, in cases where a minor is a plaintiff, to intitule the suit "A. B. as guardian of C. D. v. E. F." and, in cases where a minor is defendant, to intitule the suit "A. B. v. C. D. guardian of E. F."

In the case of *Sreenarain Mitter v. Sreemutty Kishen Soondery Dassee*,<sup>2</sup> which was a suit brought against "S. M. for himself and as guardian of his minor son N. C. M.," the Privy Council, after holding that the minor was not a party to the suit, said—"It was suggested that a suit against the father, in his own right and as guardian of his minor son, was

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<sup>1</sup> *Rajunder Narain Rae v. Bijai Govind Sing*, 21 Moo. I. A. 181; *Ranee Birjobuttee v. Pertaub Sing*, 8 Moo. I. A. 160; *Orphan Board v. Van Reenen*, 1 Knapp., P. C. Rep. 83.

<sup>2</sup> 11 B. L. R. 191; S. C., *Noggendro Chundro Mitro v. S. M. Kishen Spondory Dassee*, 19 W. R. C. R. 139.

tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the plaintiff to set aside the deeds upon the ground that there had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted."

There are other cases decided by the Indian Courts of Law on the same question.<sup>1</sup> The result of such cases seems to be that the form or title of the suit is not material, provided that the infant be represented by a properly constituted guardian for the suit, or by a person entitled to represent him under the provisions of Act XL of 1858.<sup>2</sup> In suits brought by or against wards of the Court of Wards, the provisions of the Court of Wards Act<sup>3</sup> with respect to such suits must be strictly followed.<sup>4</sup>

<sup>1</sup> *Mongola Dossee v. Suroda Dossee*, 12 B. L. R., App. 2; S. C., 20 W. R. C. R. 48; *Abdool Hye v. Mitterjeet Singh*, 23 W. R. C. R. 348; *Abdool Hye v. Banee Pershad*, 21 W. R. C. R. 228; *Komul Chunder Sen v. Surbessur Doss Goopto*, 21 W. R. C. R. 298; *Shernfutollah Chowdhry v. S. M. Abedoonissa Bibee*, 17 W. R. C. R. 374; *Nabulwip Chunder Sirkar v. Kalinath Pal*, 3 B. L. R., App. 130.

<sup>2</sup> See *ante*, Lecture IV.

<sup>3</sup> Act IV. (B. C.) of 1870, sec. 69. See *ante*, Lecture III, p. 126.

<sup>4</sup> See *ante*, p. 127.

Similarly in suits by infants, if it appears that they are properly represented by a next friend, the form of the title of the suit is immaterial.

When the fact of the minority of a person (whether a party to the suit or not) is in issue in the suit, the burden of proving minority generally falls upon the person alleging it.<sup>1</sup> It has, however, been held<sup>2</sup> that in a suit by a ward against his guardian for the possession of his property, the plaintiff alleging that he has attained majority, it is for the plaintiff to prove that he has arrived at that age.

Burden  
of proof  
when mi-  
nority in  
issue.

*Prima facie* the Court considers every party to a suit to be an adult, and this presumption must be clearly rebutted by the appearance of the alleged minor, and any positive evidence as to his age, which he, or the person alleging his minority, is bound to produce.<sup>3</sup>

The appearance of the alleged minor may be

<sup>1</sup> *Nil Monee Chowdhry v. Musst. Zuheerunissa Khanum*, 8 W. R. C. R. 371.

<sup>2</sup> *Joy Tara Dossee Chowdhraim v. Roychunder Ghose*, 1 W. R. C. R. 136.

<sup>3</sup> *Sheebunksur Dass v. Ulickchunder Aych*, 15 S. D. A. 889; *Gour Dass Roy v. Shurfoo Nissa Khatoon*, 8 S. D. A. 94; *Khettermohun Ghose v. Ramessur Ghose*, W. R. 1864, C. R. 304; *Kalee Holdar v. Sreeram Ghose*, W. R. 1864, C. R. 366; *Contra. Cheyt Narain Singh v. Bunwaree Singh*, 23 W. R. C. R. 395; and *Joychunder Raee v. Bhyrub Chunder Raee*, cited in Broughton's Civil Procedure, 4th Edn., p. 571. See also *Moorlee Dhur v. Nathones Mahtoon*, 25 W. R. C. R. 184. The English Law is the same on this point—*Borthwick v. Carruthers*, 1 T. R. 648.

taken into consideration, but it would rarely be sufficient, and the decision with respect to the issue of minority must rest mainly upon positive evidence more particularly when he has on other occasions acted as an adult.<sup>1</sup>

Mahomedan law.

The Mahomedan law provides that when a boy or girl approaches the age of puberty, and they declare themselves adult, and their outward appearance indicates nothing to the contrary, their declaration must be credited, and thence they become subject to all the laws affecting adults.<sup>2</sup>

Suit by or against adult when described as infant.

There is a class of cases, which only indirectly form a portion of the law of infants. Those cases are where a suit is brought on behalf of or against an adult, as though he were an infant. The proper course in these cases for the opposite party to pursue, is to apply to have the plaint taken off the file or amended. If he does not do so, the addition of a next friend or guardian should be taken as surplusage.

If the suit is brought or a decree is made without the knowledge of the alleged infant, it will not bind him unless he appear at the hearing or acquiesce in the decree. This mistake can never prejudice

<sup>1</sup> *Kalee Holhur v. Sreeram Ghose*, W. R. 1864, C. R. 366; and other cases, *ante* p. 427, note 3.

<sup>2</sup> *Shunsoon Nissa Begum v. Ashrufoon Nissa*, 1 Morley's Dig. Tit. Infant, p. 303; Macnaghten's Precedents of Mahomedan Law, chap. vi., case 17; Hedaya, vol. iii., p. 483, Tagore Lectures for 1873, pp. 474, 475.

the opposite party. In the case of *Shama Churn Ghose v. Taruknath Mukhopadhyaya*<sup>1</sup> the father of a defendant filed an appeal from the judgment of the first court, describing his son as a minor. It afterwards appeared that the defendant was not a minor, and the Lower Appellate Court refused to pass an order allowing the appeal by the father to stand as an appeal by the defendant. The High Court held that the Lower Appellate Court could, in the exercise of its discretion, allow the appeal to stand as an appeal by the defendant, but that the High Court could not interfere with the order on special appeal.

The following are the provisions of the Civil Procedure Code<sup>2</sup> with respect to suits or applications on behalf of an infant, which are pending at the time such infant attains the age of majority.

Procedure  
on attain-  
ment of  
majority  
when suit  
pending.

“Section 450. A minor plaintiff, or a minor not a party to a suit, on whose behalf an application is pending, on coming of age, must elect whether he will proceed with the suit or application.”<sup>3</sup>

“Section 451. If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

When  
minor  
elects to  
proceed  
with suit.

<sup>1</sup> 3 B. L. R., App. 115.

<sup>2</sup> Act X. of 1877.

<sup>3</sup> In the case of *Madhubchunder Chowdhry v. Buktessuree Debis* (12 W. R. C. R. 102), where the suit had been dismissed by the lower Appellate Court on the ground that the minor plaintiff was not properly represented, the High Court, after the minor had attained majority, permitted him to continue the suit, but on the terms that he should first pay all the costs, of the defendant, incurred up to that time.

The title of the suit or application shall, in such case, be corrected so as to read thenceforth thus :

" A. B., late a minor, by C. D., his next friend, but now of full age.

When he  
elects to  
abandon it.

" Section 452. If he elects to abandon the suit or application, he shall, if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.

" Section 453. Any application under section 451 or section 452 may be made *ex parte* ; and it must be proved by affidavit that the late minor has attained his full age.

Minor co-  
plaintiff.

" Section 454. A minor co-plaintiff, on coming of age, and desiring to repudiate the suit, must apply to have his name struck out as co-plaintiff ; and the Court, if it find that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

" Notice of the application shall be served on the next friend as well as on the defendant ; and it must be proved by affidavit that the late minor has attained his full age. The costs of all parties of such applications, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

" If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.

“Section 455 .If any minor on attaining majority, can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed. Notice of the application shall be served on all the parties concerned ; and the Court, on being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application, and of anything done in the suit.”

The next friend of an infant cannot after his ward has attained majority, and has elected not to go on with a suit or application commenced on his behalf, insist on continuing such suit or application.<sup>1</sup> If he has incurred any costs he has a sufficient remedy for them against his late ward.<sup>2</sup>

Similarly, a next friend cannot continue a suit after the death of the infant.<sup>3</sup>

A minor cannot dispose of his property by will.<sup>4</sup> The Succession Act, however, permits

<sup>1</sup> *Rani Bistuprya Patmadi v. Basudeb*, 6 B. L. R. 190; S. C., 13 Moo. I. A. 602, and 15 W. R. P. C. 19.

<sup>2</sup> See *ante*, p. 416.

<sup>3</sup> *Hulodhur Roy Chowdhry v. Judoonath Mookerjee*, 14 W. R. C. R. 162.

<sup>4</sup> Act X of 1865, sec. 46, incorporated in the Hindu Wills Act XXI of 1870. *Quare*.—Whether a person who attains majority at 21 (see *ante*, p. 29) can, after he has attained 18, make a will, see *ante*, p. 30.

a minor, whatever his age may be, to appoint a guardian or guardians for his child during minority.<sup>1</sup>

Adoption  
by infant.

An infant who has arrived at the age of discretion, that is to say the age of 15 years, can under the Hindoo law prevalent in Bengal, make a valid adoption or give a valid permission to adopt.<sup>2</sup> Where, however, he is a ward of the Court of Wards no adoption by him or permission to adopt given by him is valid without the previous consent of the Lieutenant-Governor.<sup>3</sup>

The fact of a widow's minority has been held to afford no valid objection to an adoption effected by her under instructions from her deceased husband, inasmuch as in that case the adoption is considered as the act of the deceased husband.<sup>4</sup>

Infant  
trustee.

An infant may be appointed a trustee ; but he cannot exercise any power which requires the application of prudence and discretion. An infant

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<sup>1</sup> Act X of 1865, sec. 47. The 331st section of Act X of 1865 enacts that the provisions of that Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist. It may be a question whether sec. 47 has any application to intestate or testamentary succession, as a father's right to appoint a guardian of his children does not depend on the succession of his property to them. See *ante*, p. 40.

<sup>2</sup> *Jumona Dassya v. Bamasoondari Dassya*, 1 I. L. R., Calc. Ser. 289 ; S. C. L. R. 3 I. A. 72 and 25 W. R. C. R. 235, *Rajendranarain Lahoree v. Sarodu Soonduree Dasee*, 15 W. R. C. R. 548.

<sup>3</sup> Act IV (B. C.) of 1870, sec. 74, see *ante*, p. 145.

<sup>4</sup> Rattigan on Adoption, p. 30. Shamachurn's Vyavastha Durpana, p. 770.



devisee in trust for sale, even if he have no beneficial interest, cannot sell.<sup>1</sup>

In cases to which the English law is applicable, the High Court may within the local limits of its extraordinary original civil jurisdiction<sup>2</sup> appoint new trustees in place of minor trustees,<sup>3</sup> but such appointment would generally be without prejudice to an application by the infant to be restored to the trusteeship on attaining majority.<sup>4</sup>

The Indian Trustee Act<sup>5</sup> contained the following provision with respect to minor trustees in cases to which the English law is applicable.<sup>6</sup>

"Section 8. Where any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct ; and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority and had duly executed a conveyance of the property in the same manner for the same estate.

"Section 9. When any minor<sup>7</sup> shall be entitled

<sup>1</sup> Simpson on Infants, p. 102.

<sup>2</sup> See Act XXVII of 1866, sec. 3.

<sup>3</sup> See Act XXVII of 1866, sec. 35. See Act XXVIII of 1866, sec. 34.

<sup>4</sup> *In re Shelmerdine*, 33 L. J. Ch. 474.

<sup>5</sup> XXVII of 1866.

<sup>6</sup> Sec. 3.

<sup>7</sup> Sec. 17 contains a similar provision with respect to an unborn person or a class of unborn persons.

minor trustees and mortgagees.

to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct ; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

Power to appoint a person to convey.

“Section 20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right, and the conveyance or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to

transfer any stock transferable in the books of any Company or Society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the Secretary or any Officer of such Company or Society at once to transfer or join in transferring the stock to the person or persons to be named in the order, and this Act shall be a full and complete indemnity and discharge to all Companies or Societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

“Section 30. When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof. When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

Power to make an order for the transfer or receipt of dividends of stock, &c., in name of minor trustee,

“Section 46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immoveable property, stock, Govern-

Money payable to minor in discharge of property con-

veyed under this Act.

ment securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable."

Applications how to be made.

Applications under the Indian Trustee Act must be by petition supported by affidavits or other evidence.<sup>1</sup>

Costs of applications.

Full powers as to the costs of applications are given to the High Court by that Act.<sup>2</sup>

Minor cannot take out letters of administration or probate.

Letters of administration to the estate of a deceased person,<sup>3</sup> or probate of his will,<sup>4</sup> cannot be granted to a minor.

<sup>1</sup> Act XXVII of 1866, sec. 40. <sup>2</sup> Act XXVII of 1866, secs. 42 & 49.

<sup>3</sup> Act X of 1865, sec. 189, extended to Hindus, Jews, Sikhs, and Buddhists by the Hindu Wills Act (XXI of 1870.) There is a question whether persons who attain the age of majority at 21 can, between the age of 18 and 21, take out letters of administration, and do other acts which Act X of 1865 prohibits minors from doing. See *ante*, Lecture I, p. 30. The 216th section of Act X of 1865 seems to shew that any person who has attained the age of 18 years can take out letters of administration.

<sup>4</sup> Act X of 1865, sec. 183, incorporated in the Hindu Wills Act (XXI of 1870.)

When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian<sup>1</sup> of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of 18 years, at which period, and not before, probate of the will may be granted to him.<sup>2</sup>

When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of 18 years.<sup>3</sup>

Infants (including infants *en ventre sa mere*) are not incapacitated from taking by devise or bequest though they cannot manifest their acceptance. Acceptance will be presumed unless such presumption will work injury to the devisee or legatee.<sup>4</sup> A minor can also take by succession.

<sup>1</sup> See *ante*, Lecture II. as to the right of guardianship of minors.

<sup>2</sup> Act X of 1865, sec. 215, incorporated in the Hindu Wills Act (XXI of 1870.) See Cootes' Practice of the Court of Probate, p. 99. Under the Administrator-General's Act (II of 1874) sec. 15, any letters of administration, or letters *ad colligenda bona* granted by the High Court shall be granted to the Administrator-General unless they are granted to the next of kin of the deceased, and he is to be deemed by all the Courts in the Presidency to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor, a legatee other than a universal legatee, or a friend of the deceased.

<sup>3</sup> Act X of 1865, sec. 215, incorporated in the Hindu Wills Act (XXI of 1870). See Cootes' Practice of the Court of Probate, p. 103.

<sup>4</sup> Jarman on Wills, 3rd edn., pp. 70-71.

Gift to  
minor.  
Mahome-  
dan law.

A minor can receive a gift, but his acceptance is voidable. Under Mahomedan law there can be no valid gift without an actual change of possession;<sup>1</sup> but, in the case of a gift to a minor, seisin by the guardian is sufficient.<sup>2</sup> When the guardian is himself the donor, no formal delivery or change of possession is necessary, provided that it appear that there is on his part a real and *bonâ fide* intention to make a gift to the minor.<sup>3</sup>

Gift or  
legacy to  
infant may  
be paid to  
Official  
Trustee.

The Official Trustee Act<sup>4</sup> provides that if any infant or lunatic be entitled to any gift or legacy or residue or share thereof, the executor or administrator by whom such legacy, residue or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy, residue or share may with the leave of High Court, previously obtained by motion made on petition, pay or transfer the same to the Official Trustee.

So far however as a legacy which is immediately payable is concerned, it is very doubtful whether this provision has not been impliedly, though not

<sup>1</sup> Macnaghten's Mahomedan Law, chap. v, princ. 8.

<sup>2</sup> *Moulvie Wajeed Ali v. Moulvie Abdool Ali*, W. R. 1864 C. R. 121; Macnaghten's Mahomedan Law, Precedents, chap. IV, cases 19, 20, and 21.

<sup>3</sup> *Ameeroonissa Khatoon v. Abadoonissa Khatoon*, 15 B. L. R. 67; S. C., 23 W. R. C. R. 208; *Syed Gyazooddeen Hyder v. Musst. Fatima Begum*, 1 Agra H. C. Rep. 238; Macnaghten's Principles of Mahomedan Law, chap. v, princ. 9 and 10.

<sup>4</sup> Act XVII of 1864, sec. 32.

expressly, repealed by the 308th section of the Indian Succession Act, which is as follows :—

“Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge,' by whom the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards ; and if the legatee be a ward of the Court of Wards the legacy shall be paid into that Court to his account, and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid ; and such money when paid in shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit as the Judge or the Court of Wards, as the case may be, may direct.”

Whenever a person dies leaving property, moveable or immoveable, and the person entitled by succession to such property is a minor, any agent, relative, or near friend, or the Court of Wards in cases

Wrongful possession of property to which infant entitled to succeed.

Wrongful possession of property to which infant entitled to succeed.

<sup>1</sup> In sec. 2, "District Judge" is defined as the Judge of a principal Civil Court of original jurisdiction.

within their cognisance, may, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended, apply to the Judge of the Court of the District, where any part of the property is found, or situate, for relief against such wrongful possession.<sup>1</sup>

The Judge on being satisfied by evidence that there are strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the minor is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*,<sup>2</sup> shall cite the party complained of and give notice of vacant or disturbed possession by publication, and after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a regular suit by either party)<sup>3</sup> and shall deliver possession accordingly.<sup>4</sup>

Appoint-  
ment of  
Curator.

The Judge is further empowered to appoint one or more curators to have the custody of such property during the pendency of such summary suit,<sup>5</sup>

<sup>1</sup> Act XIX of 1841, secs. 1 & 2. There is nothing in this Act to limit the territorial extent of its operation, but the fact that the Judge, if he does not act in conformity with the report of the Collector, must forward a statement of his reasons to the Court of Sadar Diwani Adalat, seems to shew that the Act was not intended to apply to Calcutta.

<sup>2</sup> Act XIX of 1841, secs. 3 & 4.

<sup>3</sup> Act XIX of 1841, secs. 4 & 17.

<sup>4</sup> Act XIX of 1841, sec. 4.

<sup>5</sup> Act XIX of 1841, sec. 5. As to the powers and duties of such curators, see that Act.



provided that when a Public Curator has been appointed for his district the Judge is bound to nominate the Public Curator, curator of such property.<sup>1</sup>

The Administrator-General's Act<sup>2</sup> gives to the High Court power to direct the Administrator-General to apply for letters of administration of the effects of any person, who shall have died leaving assets within the local limits of its ordinary original civil jurisdiction, when the Court is satisfied that danger is to be apprehended of the misappropriation, deterioration or waste of such assets unless letters of administration are granted. The application to the Court for such direction may be made by a friend of a minor interested in such assets, either as creditor, legatee, next of kin, or otherwise.

Administrator-General may be ordered to take out letters of administration.

The High Court has also power<sup>3</sup> in cases where such danger is apprehended to authorize and enjoin the Administrator-General to collect and hold such assets until the right of succession or administration is ascertained.

When a document, purporting to be executed by a person who appears to be a minor, is presented for registration, it is the duty of the registering officer to refuse to register the same.<sup>4</sup>

Registration of document executed by minor.

<sup>1</sup> Act XIX of 1841, sec. 19.

<sup>2</sup> II of 1874, sec. 17.

<sup>3</sup> Act II of 1874, sec. 18.

<sup>4</sup> Act III of 1877, sec. 35, see sec. 32, which (see definition of representative, sec. 3) allows a guardian to present for registration documents executed by an infant. See Act VIII of 1871, secs. 3, 32, and 35.

Notices to  
infants.

All notices to infants, as for instance notices of foreclosure, should be served on the guardian of the infant's estate.<sup>1</sup>

Govern-  
ment Sav-  
ings Bank  
Act.

Any deposit made by or on behalf of a minor in a Government Savings Bank, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest accrued thereon.<sup>2</sup>

The receipt of any minor or guardian for money paid to him under this provision is a sufficient discharge therefor.

The criminal law contains certain special provisions with respect to the persons of minors.

Intercourse  
with infant  
under 10.

Sexual intercourse with a female infant under ten years of age, whether with or without her consent, is punishable as rape.<sup>3</sup>

Kidnap-  
ping.

Whoever takes or entices any minor, under fourteen years of age if a male, or under sixteen years of age if a female, out of the keeping of the lawful guardian of such minor or of any person lawfully entrusted with the care or custody of such minor, without the consent of such guardian or other

<sup>1</sup> *Rasmonee Debea v. Prankishen Das*, 7 W. R. P. C. 66; S. C. 4 Moo. I. A. 392; *Kishenmohun Mitter v. Khettermonee Dassee*, 2 Hay 196; S. C. Marsh, 313.

<sup>2</sup> Act V of 1873, sec. 4; see *Gazette of India*, 12th December, 1874, p. 602.

<sup>3</sup> Act XLV of 1860, sec. 375.

person, is said to kidnap such minor,<sup>1</sup> and is punishable therefor.<sup>2</sup>

Kidnapping is an offence independently of the consent of the minor, and to constitute the offence it is not necessary that the kidnapping should have been by force or fraud.<sup>3</sup>

This provision with respect to the offence of kidnapping does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.<sup>4</sup>

The criminal law<sup>5</sup> also punishes persons who sell, let to hire or otherwise dispose of, or who buy, hire or otherwise obtain possession of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose.<sup>6</sup>

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<sup>1</sup> Act XLV of 1860, sec. 361.

<sup>2</sup> Act XLV of 1860, secs. 363 and 369.

<sup>3</sup> *Queen v. Amgal Bugeah*, 2 W. R. Crim. R. 61; *Queen v. Modhoo Paul*, 3 W. R. Crim. R. 9; *Queen v. Koordan Singh*, 3 W. R. Crim. R. 15; *Queen v. Goorodoss Rajbunsee*, 4 W. R. Crim. R. 7.

<sup>4</sup> Act XLV of 1860, sec. 361.

<sup>5</sup> Act XLV of 1860, secs. 372 and 373.

<sup>6</sup> See *Reg. v. Shaikh Ally*, 5 Mad. H. C. Rep. 473; *Reg. v. Jailli Bhairu*, 6 Bom. H. C. Rep. C. C. 60; *Queen v. Nourjan*, 6 B. L. R. App. 34.



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TRF

Accession No.

10921

Title Law relating to minors in  
presidency of Bengal

Author Trevelyan, E.J.-